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IN THE

Supreme Court of the United States

October Term—1921

Calendar No. 257

CHARLES D. NEWTON, as Attorney-General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York and LEWIS NIXON, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK, *Appellee.*

BRIEF ON BEHALF OF APPELLANT EDWARD SWANN AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK.

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IN THE

Supreme Court of the United States

October Term—1921

Calendar No. 257

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York for the First District, *Appellants,*

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK, *Appellee.*

BRIEF ON BEHALF OF APPELLANT, EDWARD SWANN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK.

Appeal from the Southern District of New York.

Statement.

This is a suit in equity instituted by the above named appellee against the appellants herein to have declared unconstitutional and void, as to appellee, Chapter 125 of the Laws of 1906, upon the ground that the rate of 80 cents per thousand cubic feet required by said statute at which gas shall be supplied to private consumers in the City of New York, is confiscatory.

In its bill of complaint, the appellee bases its contention that the statute is confiscatory upon the period from the time the statute was enacted to the time the complaint was verified, namely, January 16, 1919.

Although the Master took evidence over a period of twenty months, from January 1, 1918, to August 31, 1919, his finding that the statute is confiscatory is really based upon the first eight months of 1919.

The District Judge held that the period over which the Master took testimony was, "despite its unusual character * * * a sufficient basis for the calculation of the cost of production * * *" (Rec., p. 143A). It will be found, however, that the opinion of the learned judge was based upon his "prophecy," which subsequent events have proven to be mistaken, that the then prevailing high price levels were bound to continue for a period of at least five years.

The constitutionality of Chapter 125 of the Laws of 1906 was upheld by this Court in a suit instituted by the present appellee to have said statute declared confiscatory. The decree of the Circuit Court restraining the defendant public officials from enforcing the provisions of the act was reversed without prejudice to the beginning of a new suit "when practical experience of the effect of the act by actual operation might prevent the plaintiff obtaining a fair return * * *."

Willcox v. *Cons. Gas Co. of New York*, 212 U. S., 19.

The present suit was begun in January, 1919. The Attorney General of the State of New York, the District Attorney of the County of New York and the Public Service Commission for the First District of the State of New York, who are charged with the prosecution of violations of the statute, were made defendants herein.

A Master was appointed to take testimony, make computations and report back to the Court with all convenient speed. This report, containing findings and opinion, was filed on the 6th day of May, 1920. Thereafter and on the 26th day of May, 1920, exceptions to

said findings and opinion were filed on behalf of the defendants.

On the 6th day of July, 1920, the exceptions came on for hearing before Hon. LEARNED HAND, District Judge. On the 4th day of August, 1920, judgment was entered herein, wherein and whereby it was provided that the defendants, their successors, etc., be restrained for a period of five years from the date of the entry of said judgment from suing for any penalty or forfeiture described in Chapter 125 of the Laws of 1906, or from in any other way enforcing or attempting to enforce said act, or from taking any action under the Public Service Commissions Law to enforce said statute.

The judgment further provided, as a condition of the continuance of the injunction thereinbefore granted that until March 1, 1921, or upon an earlier promulgation of a gas rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of $1.20 per thousand cubic feet, and directed that until March 1, 1921, or until the earlier promulgation of such gas rate by such authority, the plaintiff shall, on the 15th day of August, 1920, and on the 15th day of each succeeding month, pay to the Special Master appointed for that purpose, out of moneys collected by it for sale of gas in the City of New York, the following sums:

> "All sums in excess of 80¢ collected from all consumers other than the City of New York; all sums in excess of 75¢ collected from the City of New York."

Provision was also made in said judgment that upon the promulgation of a rate earlier than March 1, 1921, the said Special Master shall by order obtained by him, distribute the moneys so collected with accrued inter-

est, in accordance with said rate as though the same had been in effect from the date of the entry of said judgment; but if no such rate shall have been promulgated on or before March 1, 1921, then he shall pay over the sums so collected with accrued interest to the plaintiff.

On March 1, 1921, no rate having been "promulgated by competent public authority," complainant fixed its own rate of $1.50.

Appellee moved to amend the decree of August 4, 1920, in three particulars: First, the provision for depositing the excess over 80 cents impounded; second, the "retroactive" effect of the new rate when fixed; third, the absence of findings. It also moved to amend the said decree by a provision seeking to expedite the appeal. This motion, in so far as it sought to change the provisions of the decree relating to the deposit of the excess over 80 cents, was opposed by the defendants. The motion was granted to the extent that the decree was modified by

> 1. Permitting plaintiff "to deposit with the master in lieu of cash, Liberty Bonds taken at their market value, or any other bonds which are a proper investment by savings banks in the City of New York."
>
> 2. By including in the amended decree certain findings specifically declared to have been confirmed and a statement in said amended decree that the other parts of the master's report are to be deemed superseded by the Court's opinion.
>
> 3. By including in said amended decree a provision to the effect that the defendants and each of them perfect and prosecute the appeal and print and file the record and all necessary papers promptly and without delay, and that the plaintiff may at any time that it is of the opinion that the perfecting of such appeal, etc., is being un-

reasonably and unnecessarily delayed apply to the Court upon notice for such modification of the decree or other action as may be warranted in the premises.

Defendants' appeal was taken within thirty days after the entry of the decree herein and said appeal has been perfected, and the "necessary papers" on said appeal were filed in the Clerk's office of this Court on the 17th day of March, 1921. On the 18th day of March, 1921, defendants moved this Court to advance the argument of the appeal herein; said motion was granted and the appeal has been set down for argument on the calendar of this Court for the October, 1921, term thereof.

No exceptions to the Master's report and opinion, and no assignment of errors in the findings and opinion of the learned District Judge were filed on behalf of complainant, except that complainant did file an assignment of errors to that part of the decree which omitted to change the retroactive effect of the new rate when fixed, but did not perfect its appeal.

History of Complainant.

Prior to 1884 there were seven gas light companies in New York City, which operated under separate charters granted at different times between the years 1823 and 1865 to 1876. These companies claimed to be possessed of certain rights to use the streets of the City for the purpose of laying their mains and service pipes so as to furnish gas to the City and to its inhabitants. None of these companies had ever been required to pay a penny for the right to use the streets, but the grant to each was in that aspect a gratuity.

Willcox v. *Consolidated Gas Co.*, 212 U. S., 19, 43.

In the instant case, the Master so found. He stated:

> "There is no evidence that the constituent companies paid anything for the franchise rights (Rec., p. 46-a)."

Pursuant to the provisions of Chapter 367 of the Laws of 1884 entitled, "An Act to Authorize the Consolidation of Manufacturing Corporations," the respondent company was organized by the consolidation of six of the seven companies doing business in the City of New York. The gas companies merged were:

New York Gas Light Co.,	Incorporated	in 1823
Manhattan Gas Light Co.	"	" 1830
Metropolitan Gas Light Co.	"	" 1855
Harlem Gas Light Co.	"	" 1855
Municipal Gas Light Co.	"	" 1874
Knickerbocker Gas Light Co.	"	" 1876

Since its organization in 1884, complainant has increased its capital stock from time to time. It has acquired the stocks and securities of other gas companies and electric companies in the City of New York, so that at the present time complainant owns all of the stock of the Astoria Light, Heat & Power Company, practically all of the stock of the New Amsterdam Gas Company, the Standard Gas Light Company, the New York Edison Company, United Electric Light & Power Company, and a majority of the stock of the New York Mutual Gas Light Company. The New Amsterdam Gas Company owns all of the stock of the East River Gas Company, the Central Union Gas Company and the Northern Union Gas Company, so that in this way the Consolidated Gas Company likewise owns these three last named companies (Master's Opinion, Rec., pp. 46, 47-a). It also owns all the gas and electric companies in Westchester County

and some of the gas and electric companies in Queens County.

The Master in his opinion states that the respondent "has a monopoly of the gas and electric business in the Borough of Manhattan, City of New York" and he should have added Westchester County and part of Queens County (Master's Opinion, Rec., p. 47-a).

In December, 1920, the Consolidated Gas Company acquired 75 per cent. of the stock of The Bronx Gas and Electric Company, which operates in that part of the Borough of The Bronx lying east of the Bronx River.

Upon organization, the complainant came into possession of a number of gas manufacturing plants. Of these plants, only four remain, namely, the 14th Street and 42d Street plants, where coal gas was in prior years made and the 21st and 99th Street plants, where water gas is now manufactured. The rest of the gas which complainant serves to the public is purchased from its subsidiaries, the Astoria Light, Heat and Power Company, the New Amsterdam, Standard and the New York Mutual.

In the prior suit, the defendants contended, and contend here, that the 14th and 42d Street plants are old, worn out and dilapidated and ought not to be considered as used and useful in the manufacture of gas. In the instant case, they were excluded by Judge LEARNED HAND (Rec., pp. 171-a to 173-a).

The New Amsterdam Company has a manufacturing plant at Ravenswood, Long Island, and sends its gas to Manhattan by the Ravenswood tunnel, which was built and is owned by the East River Gas Company of Long Island.

The New York Mutual Gas Company makes gas on Manhattan Island.

The Astoria Light, Heat and Power Company makes gas at Astoria, Long Island, and sends it over to Manhattan by the Astoria tunnel, which is owned by the East River Gas Company.

Summary of Defects of Proof.

On the trial, no evidence was offered by complainant of the cost of manufacturing gas at the plants of its subsidiaries.

The gas served by complainant and its subsidiaries in Manhattan and the Bronx is intermingled; that is to say, each of the companies making gas contributes in common so that the gas at any given point cannot be identified and may come from any one of the manufacturing plants of complainant or its subsidiaries or it may be a mixture of all the gas made at all of the different plants (Rec., pp. 4751-2).

Throughout the trial the defendants insisted that it was necessary to ascertain the operations of every one of complainant's subsidiaries, for the reason that the item, transferred gas, *i. e.*, the amounts paid by complainant for gas purchased from the other companies, is a very large part of complainant's expenses.

No explanation was attempted by complainant of the existing complexity of mains, distribution of gas by and from all of the subsidiaries, and the use in common of the mains and of employees. The officers of the complainant company admitted that they were working for the other companies but that no charge was made for their services. Mr. Alrich, an engineer in the Construction Department, testified that it was his understanding that the complainant company did work for the other companies (Rec., p. 459). Mr. Gawtry, in charge of the Purchasing Department, testified that he devoted his time to the buying of supplies for the other companies, but that there is no way of telling how much of his time is so occupied (Rec., p. 3434). Mr. Woods, complainant's engineer of gas manufacture, admitted that to determine the expenses of transferred gas the books of the other companies should be examined (Rec., p. 4753).

The proof is utterly insufficient, both in quantity and quality. The deficiencies in this respect are many, but we shall now enumerate only some of the vital elements of evidence that are lacking in the present record.

Complainant failed to sustain the burden of showing that the statute (Chap. 125, Laws of 1906) is confiscatory and unconstitutional.

With the exception of its books, the only evidence offered by complainant of the cost of the manufacture and distribution of gas was the testimony of its gas engineer, Mr. Woods, who, after describing *a hypothetical plant,* but without giving any testimony as to the labor and materials *actually employed by complainant* in the manufacture and distribution of gas was allowed to give certain costs of such manufacture, etc.

Complainant called none of its branch managers or plant superintendents or any one who received and weighed the coal or received and measured the oil, or any one who could show the actual amount of coal and oil used and the number of men actually employed in the manufacture and distribution of gas.

Complainant offered no evidence to show that the salaries paid to its general officers and the wages paid to its employees were fair and reasonable.

There is no justification for the admission in evidence of complainant's books. Complainant's expert accountant, in no way connected with any branch of complainant's business and having no personal knowledge of any of the transactions recorded in said books, testified that the figures contained therein footed accurately. Evidence of mathematical correctness is no proof of the truth of the data in said books. No witness was called by complainant to testify to the underlying data on which the entries in said books purport to be based.

The effect of the admission of the books was to shift the burden of proof from complainant to defendants.

Complainant failed to prove that its business was run honestly, efficiently, economically and prudently.

No testimony was offered to show that the expenses were reasonable and necessary.

Notwithstanding the fact that complainant's witnesses testified that they were paid by the Consolidated Gas Company, they were doing work for the subsidiaries of which no record was kept and for which no charge was made. It is plain that complainant seeks to charge against the public at least a portion of expenses that should be allocated between complainant and its subsidiaries.

The circumstances surrounding complainant's purchases of oil convict it of bad faith. On this subject, LEARNED HAND, *J.*, said:

> "The company has always bought its oil from the Standard Oil Company of New Jersey, which has a common director with itself, who is on the plaintiff's executive committee to which were referred all oil contracts. It may be assumed that there is also some common stock ownership. The position, at least of the learned corporation counsel, is, that, owing to this community of interest, the company has favored the Standard Oil Company of New Jersey in its contracts, necessarily throwing upon the stockholders of the company a heavy loss, unless it can in turn impose it upon the public. As this charge is equivalent to a fraud in the conduct of the company by its directors, it deserves scrutiny" (Rec., pp. 153-a, 154-a).

Although Judge HAND found against the defendants, it is respectfully submitted that the evidence abundantly establishes that complainant failed to sustain the burden imposed upon it of proving that its oil contracts were reasonably, prudently and economically made, and the evidence justifies the conclusion that substantial economy in

manufacture could have been effected by complainant had it used crude oil instead of the gas oil which it buys exclusively from the Standard Oil Company of New Jersey. Crude oil is cheaper than so-called gas oil and it may be and has been used by complainant in the manufacture of water gas. Had complainant's executives acted with ordinary diligence they could have obtained crude oil in quantities amply sufficient to meet the company's requirements. These latter features of defendants' contention were not discussed by Judge HAND, nor did he make any comment upon the undisputed testimony that, had complainant bought its oil at the prices paid by other gas companies for the quantities purchased by them, it would have effected a saving of over two millions dollars.

Complainant offered no evidence to show that the amount of coal said to have been used by it during the years 1918 and 1919 was reasonably necessary to produce, in connection with the amount of gas oil that was used, the quantity of gas alleged to have been made.

Complainant offered no evidence to show that the prices paid by it for coal were reasonable.

Complainant failed to sustain the burden imposed upon it of proving that the method by which it is making gas is the most economical under the conditions which have obtained during recent years.

There was no proof that the large amounts of money alleged to have been spent annually in repairs did not include replacements and renewals which should have been charged to capital account.

Complainant offered no evidence to show that the prices at which it bought gas from its affiliated companies were fair and reasonable or that the prices at which it sold gas to said companies were fair and reasonable.

Complainant offered no evidence to show the nature, extent of and necessity for repairs and that the amounts

alleged to have been expended by it for the labor and material used in the making of repairs were fair and reasonable.

A fair illustration of what might have developed had defendants had the opportunity to examine complainant's plant superintendent is shown by the 99th Street manufacturing book which was brought before the Master mutiliated, changed and altered and the alterations not explained (Defendants' Exs. AA-444, AA-445; pp. 19010-12).

Complainant failed to sustain the burden imposed upon it of proving the units of property used and useful in giving gas service; the cost or value of said units; their age and life expectancy or present condition. It refrained from attempting to prove the present cost as compared with the original cost, and made no effort to introduce other testimony such as this Court has said should be taken into account when arriving at the fair value of the property used in giving gas service. The Court below was, therefore, not in possession of the relevant elements upon which it could form a judgment or reach a reasonable conclusion on the rate base.

Complainant failed to prove the fair value of its property upon which a reasonable return should be had, and inasmuch as Judge HAND reached the conclusion that in 1918 and 1919 there was a net revenue available for a return, the complaint should be dismissed for lack of competent evidence concerning the rate base.

There are many other respects in which complainant's proof is defective. It is submitted, however, that those we have enumerated require this Court to hold that complainant has not sustained the burden imposed upon it by the overwhelming weight of the authorities of proving beyond a just, fair and rational doubt that the statute of which it complains is confiscatory and therefore unconstitutional.

POINTS.

I.

Defendants Have Not Had a Fair Trial.

Defendants' claim that they have not had a fair trial is set forth in their assignment of errors Nos. "5" to "20," both inclusive (Rec., pp. 202-a to 204-b).

Neither before the Master nor before the learned District Judge, who heard and decided the exceptions to the Master's report, have the defendants had their day in court.

The argument on the exceptions to the Master's report began on the 6th day of July, 1920, and was concluded on the 9th day of July, 1920. On the 4th day of August following, the learned District Judge handed down his opinion, consisting of eighty-three printed pages.

The record of the trial contains 15,918 printed pages. There were 1,027 exhibits received on behalf of complainant and defendants. Many of these exhibits are voluminous and cover complicated tabulations of figures which require extended analysis.

In his opinion, Judge HAND makes two allusions to defendants' complaint that the Master peremptorily shut off cross examination on two relatively unimportant items; one, as to the company's superannuation payments, and the other, its automobile charges (Rec., p. 165a). It is a fair inference from the circumstances, that the learned District Judge's examination of defendants' contention was purely negligible.

On the argument, Judge HAND stated:

> "I don't want to examine the record unless I am absolutely obliged to. I will tell you why I do not. I might as well state now; perhaps I had

> better. I mean, you can break out in a case; certainly a man who is somewhat impetuous can break out with a great many things which have an arbitrary look, and sometimes they are. Some of the things which have broken out in this record, I think I may frankly say, are unfortunate, but you cannot tell much about the whole thing without knowing just how it arose, particularly when the trial is without the formality of a judge, where there is a certain amount more of a reserve than accompanies a trial before a master; and, unless I am forced to do it, I don't see how I can deal with that part of the case without really reading the whole thing."

It is evident that the learned judge was of the opinion that it would be necessary for him to read the entire record in order properly to decide the defendants' claim of unfair trial. If he acted upon that belief—and it is a fair assumption that he did—the defendants' statement that they have not had their day in court is justified. Defendants were entitled to have this contention examined even if it involved—which it does not—a perusal of the entire record.

In our statement of what occurred on the argument before the learned District Judge, we have not intended to convey the impression that we complain of his conduct as arbitrary or as evincing a disposition wilfully to neglect his duty. It is a real pleasure to state that his demeanor towards counsel was marked by the most delightful urbanity. But, on the several occasions when the defendants' claim of unfair trial was discussed, the learned District Judge expressed the utmost dismay at the prospect of "being compelled" to go through the voluminous record before him. Our sense of duty impels us to mention this, not in any spirit of harsh reflection upon the conduct of an honorable and upright judge, but merely to apprise this Court of the fact that our conten-

tion that we have not had our day in court has not yet been the subject of examination and review.

The point now made transcends in significance every other issue in this case; for nothing can exceed in importance the vital, indispensable necessity of preserving that confidence in the fairness and impartiality of our judiciary which is so essential to the orderly administration of justice. This would be true, even if the finding that the statute is confiscatory were based upon a margin so wide that there could not be any room for reasonable doubt of its unconstitutionality. In the instant case, the gap between validity and illegality is so narrow that little is needed to turn the scale in favor of the statute. This circumstance—so it seems to us—emphasizes the importance of having a decree entirely free from the suspicion that it was obtained by means which shock the conscience or outrage the sense of justice.

In the trial of every lawsuit there are certain fundamentals which may not be violated with impunity. The judge must be impartial and give to counsel the fullest opportunity to present their evidence, state their contentions, and cross examine adverse witnesses. What are the limits to which cross examination may usefully or fairly be permitted to proceed is rarely, if ever, incapable of ascertainment by the judge endowed with an ordinary degree of common sense and patience.

In the instant case, the attitude of the Master was that of an impatient, impetuous and offensive advocate. His conduct towards defendants' counsel and defendants' witnesses was indefensibly arbitary and discourteous; while his openly expressed contempt for what he was pleased to term the stupidity of our legislators and the scandalous incapacity of some unnamed judges, simply reveal his temperamental unfitness to sit in judgment on the issues before him.

An exhibition of bad manners by a judicial officer

may not alone be sufficient to justify the reversal of a judgment. But, in the instant case, attention is directed to some of the Master's splenetic outbursts solely for the purpose of showing his utter lack of that judicial poise so necessary for the proper conduct of the case and the fair disposition of the issues.

> "The Master: I wouldn't care if it was allowed by every judge in the United States; I won't allow it" (Rec., p. 2032).
>
> "The Master: I have the least respect for authority, perhaps, of any man in town" (Rec., p. 2032).
>
> "The Master: I don't care about rules; I don't care about precedents" (Rec., p. 2048).
>
> "The Master: You need not argue it, Judge Ransom. So far as I am concerned, unless I change my mind, which is improbable, I am going to rule that this item of $40,000 is a proper item of expense, and I don't care what the judges or commissions have done. If I am wrong, the courts will have to reverse me, but I am going to put it in" (Rec., p. 3053).
>
> "Mr. O'Brien: Well, the courts have ruled against such things.
>
> The Master: Well, they have ruled wrong. The trouble is, that in too many cases, the courts don't understand business, have not had business experience. * * * That is one trouble with our Bench. We have had too few men who have had actual experience with business affairs. * * * It has been a scandal in this community for years, the judges we have had. * * * I am saying that so the stenographer should take it down" (Rec., p. 6355).

At a later stage of the trial the Master reiterated that he is "no respecter of persons or precedents" and did not respect Judge GREENBAUM's decision (in *Kings Co. L. Co.* v. *Lewis*, 110 Misc., 204), "unless it agrees with mine" (Rec., p. 10453).

If any further evidence were needed that it is the Master's unalterable belief that he is right whenever he reaches a conclusion, it is to be found in the following:

> "The Master: In other words, Mr. O'Brien, I do not care who the man is or what the point is, whether I am attorney in the case or am the judge; if he reached a conclusion that is not in accord with my judgment, I may bow to the decision, but it never changes my judgment" (Rec., p. 10453).

The Master's statement that if he ruled wrong, the courts would have to reverse him, was repeated several times during the trial (Rec., pp. 5956-7; 6619-20; 6787-96).

These utterances disclose an attitude as unfortunate for the complainant as it is for the defendants. It may seem like a hardship to compel the parties to assume the task and incur the toll of a new trial. But we are confident that circumstance will not sway this tribunal if it concludes the defendants have not had their day in court.

Upon the argument before the learned District Judge, the mere size of the record appeared to make it "incredible" to him that there could be any desire or necessity for additional hearings. We earnestly ask the Court not to be pursuaded into the belief that the great volume of the record is a necessary indication that ample opportunity was afforded to the defendants of eliciting those facts which are essential to the proper determination of this controversy. The Master's constant and unwarranted interference with defendants' direct and cross examination was not merely a source of embarrassment to counsel and an encouragement to evasion on the part of adverse witnesses, but it prevented defendants from getting into the record much evidence which should have been taken for the reviewing Court's consideration. The Master acted as though he was the court of last resort. He in-

sisted that he was "the boss in this courtroom," and announced that he did not care for precedents or what other judges or commissions had decided.

The unusual length of the record is attributable largely, if not entirely, to the Master's overwhelming instinct for debate. Evidence of this propensity will be found in the Master's repeated arguments with witnesses and counsel. Perhaps the most amazing exhibition ever witnessed in a courtroom occurred at the close of the case. When the taking of testimony had been completed, the Master announced that he would not receive briefs but preferred to have counsel make oral presentation. Defendants' counsel hoped that at last they would be permitted to state their views in fairly consecutive fashion. Their wishes were balked by the Master, who declined to allow them to sum up, but insisted on conducting a cross examination of the defendants' counsel upon points which he had selected for his inquisition.

Before we begin our discussion of the Master's repeated and unwarranted interference with the cross examination of complainant's witnesses by defendants' counsel, we give a few excerpts from the record indicative of the Master's bias and offensiveness. In speaking of the Master's offensiveness, we quote him, not because of any desire to assume the task of exposing his lack of good taste, but because it is our duty to call attention to the direct results of the Master's invasion of the rights of counsel. Judicial tyranny in any form is repugnant to the sense of justice of all decent Americans. When that tyranny assumes the form of jibes and sneers from the Bench, it becomes peculiarly odious and harmful, because the power to guard against it is not immediately present. In the instant case, the Master treated counsel as though they had neither sensibilities to wound nor capacity to resent. This complaint is not made because of its per-

sonal effect. Adverse witnesses are quick to take their cue from the judge, if a judge can be found who assumes the role of an advocate or cares nothing for judicial dignity or decorum. If such a judge openly indicates that he believes counsel's statements "perfect rot," or his questions "silly," "ridiculous," "purposeless" or asked only because counsel are on "fishing excursions," it will readily be seen how far counsel will be able to progress in eliciting answers. And this Court will easily appreciate how unnecessarily burdensome counsel's labors were made by the conduct of the Master whose sole object appeared to be to obstruct, annoy and humiliate, and who gave way to unseemly outbursts of temper when counsel attempted to pursue a line of inquiry which did not agree with his views.

First, as to the Master's bias.

One of the important questions raised by the defendants on the trial was complainant's failure to comply with that part of the statute which requires it to supply its consumers with gas of 22-candle power. A fair illustration of the Master's incapacity to consider this question judicially will be found in his comments upon the statutory candle power requirement.

> "The Master: In spite of this close affinity between the Consolidated Gas Company and the Standard Oil Company of New Jersey, it apparently is the fact that this 22-candle power was put in in the interest of the oil companies and it is time it got out" (Rec., p. 11349).
>
> "The Master: It (the 22-candle power requirement of the statute) just illustrates *some of the stupid things the Legislature does*" (Rec., p. 11985).
>
> * * * * * * *
>
> "The Master: *The trouble is, we are dealing with a fool statute*" (Rec., p. 13028).

In view of the foregoing utterances, it is not surprising that the Master's prejudice against the statute was reflected in the impatient and contemptuous manner in which he refused to permit defendants' witnesses to testify to complainant's repeated candle power violations. What else could be expected from the Master who believes our legislators stupid and our judges scandalously incompetent?

By Chapter 735 of the Laws of 1905, which is still in force and effect and is known as Section 522 of the Charter of The City of New York, it is provided:

> "The said commissioner of water supply, gas and electricity shall appoint inspectors who shall inspect and test the illuminating gas manufactured within The City of New York or furnished or sold to said city or to any consumer therein. * * * The gas manufactured, furnished or sold as aforesaid shall be tested with reference to illuminating power, pressure and purity, *in a suitable manner and by proper apparatus* at least once each day, and shall also be tested whenever the said commissioner shall direct. The inspectors shall report under oath the results of their tests to the said commissioner daily and the said commissioner shall file the said reports in his office and the same shall be public records."

Every attempt by the defendants to show by William Birdsley, an employee in the Department of Water Supply, Gas & Electricity of The City of New York since 1906; a qualified chemist, and acting chief gas examiner for the City since 1913 (Rec., pp. 12660-1), that candle

power tests of complainant's gas were made by a well-known, proper and competent method, was defeated by the Master's rulings (pp. 12842-9).

The Master would not allow the defendants to show that tests made of complainant's gas by the City's inspectors were mailed each day to complainant (p. 12814). This testimony had a material bearing upon the question of whether or not complainant ever made protest or complaint that the tests were wrong.

Nor would the Master permit defendant's witness Little to testify in regard to the C. P. provisions of the statute when open flame burners are used. The materiality and importance of this testimony are shown by the following: The defendants offered to show by a letter dated November 30, 1917, written by R. A. Carter, one of the complainant's Vice-Presidents, to the Public Service Commission, that the company had 609,264 consumers who are using 1,507,038 open flame burners and that the rest of its 236,200 consumers were using incandescent mantle lights and electric lights, but the Master would not allow the letter in evidence (Rec., pp. 13004-6).

While Mr. Little was testifying something was brought out on cross-examination that the 22 C. P. standard was out of date. The defendants desired to show by Mr. Little, on redirect, that had he known there were so many consumers using open flame burners he would express no opinion concerning the 22 C. P. requirement and would have testified had he been permitted that the consumers using open flame burners require a 22 C. P. statute.

What occurred at this stage of the trial is such an aggravated instance of the Master's arbitrary behavior, that it constitutes one of the strongest links in the chain of circumstances urged in support of defendants' contention that they have not had their day in Court (Rec., pp. 13002-7).

In his opinion, the Master stated:

> "I am not at all satisfied that the City inspectors were in all cases correct in their observations. The gas was not tested in the manner which the statute seems to require. It is not necessary for me to go into details of this gas testing." (Rec., p. 58a.)

This is such a serious charge against an important department of the City government that the Master should have supported it, if he could, by giving the details "of this gas testing." It is submitted that the reason he did not deem it necessary to give the details was because of his own prejudice against the statute and the "stupid" legislators who enacted it.

In his opinion, the Master stated:

> "For the purpose of determining the amount of working capital, I have accepted Mr. Little's figure, which makes the working capital on the basis of 19 billion cubic feet of sales as nearly as may be determined, $3,800,000" (Rec., p. 70a).

In making the foregoing statement, the Master forgot his judicial position—if indeed, he ever remembered it—and assumed the role of a certain type of advocate who is not particular about the pretext which he uses in the effort to sustain his contention. *Little gave no figure for complainant's working capital.* In fact, he gave no testimony whatever as to working capital on direct examination. While he was under cross examination, he was asked about some testimony he had given on the subject *in the case of The People's Gas Company of Chicago.* He then testified:

> "Q. Now, in the People's gas case, did you not estimate that a proper allowance for working capital in the form of materials and supplies and cash, working capital, should be 25 cents per 1,000 cubic

feet of gas sold? A. That was a very rough figure given, yes. In the People's case I did not make any detailed appraisal, but suggested that figure, it having been used by the Commission in some other cases.

Q. That figure of 25 cents per 1,000 cubic feet of gas sold for materials and supplies and cash working capital, was a figure which had been adopted by your Commission in various cases? A. In some smaller cases.

Q. And in the People's gas case you testified to that as a figure which you gave there? A. I believe that is correct * * *"

At this point, the Master interposed, evidently for no other purpose than to make it appear that Little had given a figure for complainant's working capital which he could use as the basis of his finding. It is too plain for discussion that Little's answers to the Master's questions refer only to the figure of 25 cents to which he testified in the Chicago case.

"*By the Master.*

Q. You said you thought 25 cents was a little high. What do you now think is nearer right, 22 or 22½? A. Nearer 20 I would say.

Q. Somewhere between 20 and 25? A. Yes, sir, somewhere around there. It depends a good deal on market conditions. A gas man has to jump in when the market is low.

Q. It is a question of judgment very largely? A. Yes, sir.

Q. So you would not say absolutely that 20 is right and you would not want to say that 25 was, absolutely, under all conditions, too high? A. No, not under all conditions.

Q. Under varying conditions, would not 22½ probably hit it right, nearer than any other figure? A. I would hate to be definite at this time on that.

Q. You can't be definite, because it is a matter of judgment? A. I will say between 20 and 25.

Q. Twenty two and one-half is somewhere between? A. You are making a straight average.

Q. That is the only way we can do in most human affairs, to take average conditions? A. I think your judgment is better than mine on that.

The Master: All right, so we are not very far apart between the complainant's evidence and the defendants' as to working capital. We will get that out of the way" (Rec., pp. 11327-9).

What has been stated about the Master's purpose may appear harsh, but the record justifies it.

While counsel for the defendant Swann was discussing the trend of oil prices, the Master interrupted him with the question:

"For 1919, what did Mr. Little say; at least six cents, wasn't it"?

The following colloquy then ensued:

"Mr. O'Brien: Mr. Little took an arbitrary figure there.

Mr. Ransom: 7 to 10 cents.

Mr. O'Brien: For his estimate he took an arbitrary figure of six cents without going into the question of the proofs in the case.

The Master: That was his judgment, then, that six cents was a fair price.

Mr. O'Brien: No, it was not his judgment. That was perfectly clear. He just assumed a price.

The Master: But a man like Little has not used a figure that he does not think is right" (p. 15830).

The Master was disingenuous, to say the least. With a mind as keen as his, he should have had no difficulty in remembering that when Little testified, he distinctly stated his oil price was assumed without conceding its accuracy or fairness and only for the purpose of rounding out his production cost estimates (p. 11261).

The Master had a decided predilection, which no amount of evidence could remove, that the high level of prices caused by the World War were here to stay for at least five years. He was so obsessed with this view that it undoubtedly inspired the decree which he rendered in complainant's favor.

At the close of the case, when he and defendants' counsel had the rapid fire debate which he was pleased to term an oral presentation of the facts, the Master informed counsel for the defendant Attorney General that he was so convinced complainant would not be able to buy its coal and oil and labor for less within the next five years than it paid in 1918 or 1919, that there was no need spending any time arguing it. As the Master expressed it, he was "satisfied beyond the shadow of a doubt." Although he was careful to state that his views are based upon what appears in the record, the record itself abundantly shows that he began the taking of testimony with the decided conviction that the complainant was losing money and that the burden of proving that the statutory maximum rate of 80 cents charged for gas was not sufficient to save complainant from financial disaster was upon the defendants (Rec., pp. 15711-15712).

On several occasions, the Master forbade cross examination on the *ex parte* statement of complainant's counsel that his client was losing $18,000 a day.

> "The Master: I do not think that this is useful to me. * * * I won't spend any more time on that, at the rate of $18,000 a day. * * * I am assuming that the complainant is losing $18,000 a day, according to its claim.
>
> Mr. Ransom: More than that now.
>
> The Master: More than that now, I must assume, on Judge Ransom's statement, for the purpose of limiting cross examination where I think it is unnecessary" (Rec., p. 6756).
>
> "The Master: This cross examination is not

useful. It is not worth $18,000 or more a day" (Rec., p. 6769).

"Mr. O'Brien: Your Honor is running through a pretty narrow pathway.

The Master: I have to, when the complainants say they are losing $18,000 a day. I have got to eliminate everything that will not be helpful to me" (Rec., p. 6780).

Neither at the time the statements just quoted were made nor at any other time during the trial did it appear that complainant was losing $18,000 or any other sum daily.

A daily loss of $18,000 would amount in one year to the sum of $6,570,000. Upon the basis of the learned District Judge's findings, in 1918 the complainant earned on its investment under the 80 cent statute, $3,263,400 and in 1919 $2,104,200 (Rec., p. 182a).

As to the Master's offensiveness.

In civil cases, the instances in which judgments have been reversed because of the arbitrary or discourteous conduct of the trial judge are, happily for the reputation of the American judiciary, comparatively few.

In *Bennett* v. *Harris*, 68 Misc. Rep., 503, 507, 508 (New York Supreme Court, Appellate Term), the judgment of the Trial Court was reversed because, among other things, the learned Trial Justice characterized the objections of defendant's counsel as "ridiculous." The language of SEABURY, *J.*, who wrote the opinion in that case, is peculiarly applicable to one of the numerous situations of which the defendants here complain.

> "A trial in which counsel for one of the parties is held up to ridicule by the court for making proper objections * * * is not a fair trial. * * * Every advocate who has been subjected to such an experience knows well its embarrassment and the serious manner in which it hinders a proper discharge of his duties. * * *

'We presume not,' said the Supreme Court of Georgia, 'to prescribe the intercourse between the court and the bar. We leave that to the good sense and the high breeding which so generally characterize both, except when we find it affects the rights of parties; then it is within our corrective jurisdiction'" (*Long* v. *State*, 12 Ga., 295, 330).

It is true that in the *Bennett* case, the evil effect of the judge's remarks was aggravated by the fact that they were uttered in the jury's presence. But that circumstance does not weaken defendants' contention. The Master's conduct encouraged if it did not invite evasion and subterfuge on the part of complainant's witnesses.

"Q. Mr. Alrich, were you assigned to this work of making up reports of property withdrawn from time to time from use, by Mr. Bradley or Mr. Morris or Mr. Woods?

The Master: The question is not allowed and unless counsel will get on some line of inquiry that I think is useful, I shall direct the witness to leave the stand. The witness has said half a dozen times that was his business, that was his job. That is what he has been doing for years. What is the use of repeating it over and over again?

Mr. O'Brien: Your Honor apparently does not see the purpose of my questions.

The Master: *I never do see the purpose of your questions. There have been very few questions that you have asked on cross examination that seem to have a real purpose.*

Mr. O'Brien: That is a sweeping remark, your Honor, and I take exception to it.

The Master: You have called for it by the statement you make.

Mr. O'Brien: Well, I note my exception to it if it indicates the mind of the Master. I want to say right here that the reports are made under oath by the company to the Public Serv-

ice Commission and we have a right to find out just whether these reports are made from information and directly from information furnished by this witness.

The Master: I will not allow any more questions on that subject.

Mr. O'Brien: And the connection ought to be established, your Honor, because there ought to be somebody under oath in this case that is going to be responsible for the proposition that moneys have been spent and that books have been made up. We have got to get somebody under oath who will feel the responsibility of an oath and who will stand for the testimony in this case. Now, I want to find out from the witness whether these engineers, Mr. Bradley, Mr. Morris and Mr. Woods, have as to certain branches of information—this particular branch at this moment, withdrawals—depended entirely upon his report, whether he was the one who was delegated to take care of that particular report.

The Master: And I will say I will not permit any further inquiry on that line. It has been sufficiently covered.

Mr. O'Brien: I note an exception" (Rec., pp. 8002-8004).

The Master frequently made the statement "it has been sufficiently covered" as an excuse for peremptorily shutting off cross examination. On numerous occasions, his observation applied to subjects that had been "covered" by the testimony of Teele, who had no personal knowledge of any of the details of complainant's business. In the particular instance now discussed, complainant's engineer of construction was on the stand and it would seem that defendants were entitled to learn from him whether or not engineers Bradley, Morris and Woods depended entirely upon the witness for the information embodied in reports to the Public Service Commission.

And, assuming that the matter had been "sufficiently covered," the Master's comments during Alrich's cross examination had the direct effect of encouraging the apparently natural propensity of the witness to quibble. Alrich's conduct throughout was pert. Occasionally he was downright impudent, and acted as though it gave him particular delight to exasperate by pretended ignorance of the meaning of counsel's questions. Alrich evidently believes that imitation is the sincerest form of flattery. The Master stated that he could not see the purpose of any of Mr. O'Brien's questions. Quick to take the Master's cue, Alrich frequently requested explanation of questions, thus implying that the counsel who propounded them was too obscure for ordinary comprehension.

While Walter R. Addicks, one of complainant's vice-presidents, who testified that he has charge of complainant's purchases of oil "and certain residuals, excluding coke" (Rec., p. 3777), was under cross examination, the following occurred:

> "The Master: * * * I am asking you how these questions will in any way, shape or form attack the witness's testimony with reference to what was paid for oil, for the reasonableness of the charge, and what they got for the drip oil, and other things.
>
> Mr. O'Brien: Directly on his tabulations they show a certain amount of money. His evidence is that a certain amount of money was paid for oil. I say, it is proper cross examination to find out how much they contracted to get from the United States Government to offset that money and how much they had been getting from the Government, if they got anything, and what the amount is that they are going to claim from the Government that must be charged up against the amount specified in the exhibits.
>
> The Master: For the time being, the objection will be sustained.
>
> Mr. O'Brien: That is only one of several reasons for the examination.

The Master: At this time I sustain the objection.

Mr. O'Brien: I submit that the effect of it will be that the witness will be taken off, like Teele was, and rehearsed and brushed up and put back again.

The Master: No, they can't rehearse and brush up a witness in a matter of that kind. *You might do it in a shirt waist case that is being tried in the City Court, but not in this case*" (Rec., pp. 4114-15).

Instances in which complainant put on a witness, finished his examination and then recalled him, were not of infrequent occurrence throughout the trial.

"The Master: I just want to explain to you, Col. Hayward, that you are not running a regiment in this case; you are just one of counsel for the defendants * * *" (Rec., p. 4378).

Col. Hayward served his country with honorable distinction in France during the recent World War. Of course, that fact does not entitle him to any greater consideration than any other counsel. What connection there is between the conduct of an American army officer's management of a regiment in the field and his behavior on the trial of a law suit in a court room we are at a loss to understand, unless it be that the Master thought Col. Hayward too brusque for his gentle nature.

"The Master: Well, I won't argue with you whom you were addressing, but when I was trying to get your attention and trying to say something to you, you addressed me in a manner which would indicate that you were running a regiment here, and that I had nothing to say about it" (Rec., p. 4740).

"Q. Can you (Mr. Brundage, chief of complainant's accounting department) explain the various payments made during the year 1908 (1918?) to the Municipal Lighting Company?

Mr. Ransom: Objected to.
The Master: Objection sustained.

* * * * * * * *

It is perfectly ridiculous to assume that the witness, head of the accounting department, likewise agent in charge of the Astoria Company, having 18,000 vouchers and more going through his department in the year 1918 would undertake to say that he recalls payments to particular concerns at particular times or at any time" (Rec., pp. 6100-1).

Whether it was "perfectly ridiculous" or not, counsel was entitled to the witness's answer. The Master's language might easily have been taken by the witness as an invitation to offer the excuse that he could not remember the details of any voucher in view of the great number which pass through his department.

"Q. Did you (Mr. Teele, an accountant employed by complainant to make tabulations from its books) see receipts for the moneys that are set forth in this account (superannuation) from the beneficiaries who are supposed to have received them?

The Master: Same ruling. Exhibit 364 being a summary in different form, will contain the same figures as Exhibit 205. I will not allow any more questions on that. * * * I will not permit any more questions about Exhibit 205 or Exhibit 364. * * *.

Mr. O'Brien: Your Honor appreciates the difficulty of conducting an examination where part of the ground has been gone over in the preliminary cross examination.

The Master: What is the use of wasting time looking up anything? I will not let you ask a question.

* * * * * * * *

Mr. Chambers: We ought to except on the record, Mr. O'Brien, or at least I shall on the ground that no questions that I have asked in this court have been on a fishing excursion or anything like it, and I except to any rulings made in that regard.

The Master: I think you made that statement a little while ago.

Mr. Chambers: I think we ought to make it every time he says it is a fishing excursion. We are here under our constitutional rights trying to uphold a statute which was passed by the Legislature, which has been in existence for a number of years, which has been sustained and upheld by the highest court in this land, and we have a right——

The Master (interrupting): Is that anything new?

Mr. Chambers: We have a constitutional right to see to it that the evidence produced here is sufficient to destroy this statute.

* * * * * * * *

The Master: I am going to insist on controlling this trial.

Mr. Chambers: I would like to make a statement.

The Master: I won't let you, now.

Mr. Chambers: I except to the Master's refusal to allow me to make what I think is a very important statement.

The Master: All right now. You have taken your exception. Now stop it. Have you got a question to ask, Mr. O'Brien?

Mr. Chambers: I want to see the trial conducted in a proper way.

The Master: If that happens again, I will

have to make a very drastic rule about it; it has got to stop.

Mr. Chambers: I think we have a right to rise and speak.

The Master: I am not complaining about your rising or not rising. I want you to stop talking when I tell you to. I am the Judge here.

Mr. Chambers: Exception.

The Master: You might not like my rulings, but I am going to insist upon being the boss in this courtroom. * * * I will say for the record now that unless questions are pertinent, tending to bring out a wrong basis or an error or something that will be beyond what I call a fishing excursion, in spite of the protest—" (Rec., pp. 6889-6893).

"Q. Did you (Alten S. Miller, engaged by complainant to make an examination of its buildings, stations and apparatus so as to testify to their condition) look at the engine house over there * * * 99th Street? A. Yes.

Q. Was that one of the buildings that you found needed some foundation work?

The Master: I will sustain the objection, because if he did, it will be on that schedule.

Mr. O'Brien: It does not appear, your Honor.

The Master: Then he did not.

Mr. O'Brien: *He doesn't state.*

The Master: I will not allow that question; it is a *useless* question.

Mr. O'Brien: From the witness's answer, it did not appear whether he meant generally that he figured on foundations where he found that the building had settled, or whether he meant that at 99th Street in several instances he had so figured.

The Master: Next question" (Rec., pp. 7669-7670).

"The Master: * * * The witness (Miller) is called to show that it costs a great deal more to make repairs now than it did four years ago. Go ahead and cross examine him about it. I will not let you cross examine him long about it, because I think it is beyond question of doubt. *I think any man who questions it is a fool*" (Rec., p. 7740).

"Mr. Chambers: You do not give us an opportunity to really cross examine where we think we ought to.

The Master: That is where you and I differ. I sat here patiently *listening to a lot of drivel* until I think I have gone far enough" (Rec., p. 7965).

"Q. (To Mr. Carter). Who made it up? Who took them off the books (figure of 6½ cents for commercial expenses)?

The Master: Wait a minute. Don't get excited. How much do you say they ought to be?

Mr. O'Brien: I am not saying anything, your Honor. I note an exception to your Honor's comment on the record that I am excited; nothing excited about it.

The Master: How much do you say it ought to be? * * * Six and one-half cents, the question of expense? How much do you say it ought to be?

Mr. O'Brien: I don't have to say anything about it, your Honor. * * * I am not on the witness stand.

The Master: You are going to tell me before this case is closed. You have got to make some claim before this case is closed. Unless you want *your* case to appear utterly ridiculous, you have got to tell me something" (Rec., p. 8652).

The Master's demand to be told defendants' claim is based upon a false premise. He put the burden of proof upon the defendants shortly after the trial started. His conception was, not that it was incumbent upon complainant to prove that the charges contained in its books were fair and reasonable, but that it was defendants' duty to show they were not. He became impatient almost to the point of fury when defendants reminded him that the burden of proof was upon complainant and never shifted. Hence, the remark, "unless you want *your case* to appear utterly ridiculous," etc. The case was not defendants'. It was complainant's.

"Q. Did you (Mr. Carter) include 'Gas Logic' in any one of these expenses concerning which you gave testimony since you went on the stand? A. Yes.

Q. And in your opinion, that paper, 'Gas Logic' is a book that the consumers ought to bear the expense of? A. Most decidedly, should go into the cost of gas.

Q. It is helping the gas business? A. It is helping the gas business; it is helping the consumers; it is helping to keep the cost of gas down to the lowest possible figure.

Q. In what way, by promoting the sales? A. By promoting the use of it.

Q. Do you think that by increasing the sales you can keep the cost down?

The Master: Not allowed.

Mr. O'Brien: Just a minute, your Honor——

The Master: No, I won't have 'just a minute.' We have had enough of it; *I am sick and tired of this cross examination; there is nothing to it.*

Mr. O'Brien: I except to your Honor's being sick and tired on the record here. I object to the comment and take exception to it. A man has come in here and tried to add six and a half to the commercial expenses.

> The Master: I will let you go to the limit to find out how Mr. Carter figures six and a half, and to criticise any item, but there is some limit somewhere to *purposeless, useless questions.* I repeat it again on the record. Go ahead.
>
> Q. Have you got a mailing list of 'Gas Logic'?
>
> The Master: Not allowed—*silly*" (Rec., pp. 8662-3).

Mr. O'Brien's attempt to cross examine Mr. Carter on the subject of "Gas Logic" is not as "silly" as the Master appeared to think it was. "Gas Logic" is a magazine published by complainant ostensibly to boost the sale of its gas appliances. Robert E. Livingston, complainant's publicity agent, is its editor. He receives from complainant an annual salary of $12,000 and "expenses," the vouchers for which Mr. Livingston "has been destroying every week for the last 15 years" (Rec., p. 10770). The expense of printing, publishing and circulating "Gas Logic" is charged as part of complainant's operating expenses.

On the argument on the exceptions to the Master's report, it was stated by Colonel Hayward, that part of Mr. Livingston's activities consisted of getting into the newspapers, Mr. Ransom's intended opening statement to the Master, which the Master refused to hear. Colonel Hayward also stated that on the 9th day of July, 1920, when the argument before the learned District Judge was still pending, "Gas Logic" published an article entitled "Consolidated Gas Company's Losses." Neither of these statements was challenged by complainant's counsel.

> "Mr. O'Brien: This examination (of the witness Carter, who had testified that late in 1918 the complainant adopted a method which modified the basis by which the quantity of transferred gas was

determined) is going to be useful to you in many ways. In the first place, your Honor, this examination, what the witness has already said, and what has been recorded in this case, shows that you cannot make a finding upon the essentials of the action now being tried by you without trying every one of the companies. You have got to bring them all in here; you have got to try them as one company.

The Master: *That is perfect rot"* (Rec., p. 8696).

"Mr. O'Brien: If you will go into Mr. Woods' testimony, you will find how sedulously he avoided the manufacturing results and the cost of operations at 99th Street and 21st Street. When he was cross examined on this hypothetical figure, he was asked whether he had gotten the results of the 99th Street and 21st Street stations and he said, 'No' and he offered no excuse why he had not. These things are illuminating. The question of all these inter-company operations that you have gone into serves to indicate that you cannot try this case * * * without bringing in all of the companies.

The Master: *That is rot"* (Rec., pp. 15607-8).

That Mr. O'Brien's statement of the necessity for bringing in all of the companies is not the "rot" which the Master was pleased to term it, is apparent from the Master's own statement to complainant's counsel during Mr. Carter's direct examination:

"The Master: The trouble with the case is this. *You have not attempted to prove up as an independent item, the cost of manufacturing in the Astoria Company by the other companies. You have not attempted to go into the proof of their invested capital in the same form that you have as to the Consolidated.* The whole theory of your case is that you have paid them a reasonable price for the gas furnished and it is on that theory that

I am excluding this question. I will have to work out this case on my own theory from the best evidence I can find in the case.

Mr. Ransom: I am offering to show that the total taxes paid to the public authorities upon the property used in making and distributing this total quantity of gas (by the Astoria Company) was so much.

The Master: I will not take it. If I took that, I would have to go into every other element, what was their payroll, and everything else involved in the making of gas. I would have to take up each plant and find what it cost to make gas" (Rec., p. 8819).

The Master repeatedly sustained objections to questions put to witnesses on direct and cross examination by defendants' counsel, although no objections to these questions were interposed by complainant's counsel. These occasions are so numerous (they number approximately one thousand) that to quote and discuss them all would expand this brief to an unreasonable length. We cite a few of the more important instances.

At the outset, it is pertinent to observe that these questions could have been answered in much less than the time consumed by the Master's inexhaustible capacity for speech. This deluge of words, much of which consists of lectures of defendants' counsel *on the way in which a trial should be conducted* (!) accounts in great measure for the unecessarily large volume of this record.

Of the first witness called by complainant, Herbert W. Alrich, it is important to note that much of his cross examination could have been avoided had complainant's counsel been permitted to state for what purpose he was produced. Although the Master repeatedly, and, in some instances, rather violently insisted upon being informed by the defendants' counsel why certain questions were asked by them, he refused defendants' reasonable request

to have counsel state to what point Mr. Alrich's testimony was to be directed.

It was not complainant's practice to put on a witness and have him testify consecutively to all of the matters for which he was produced. It called a witness, examined him on a particular subject; withdrew him, and subsequently recalled him on other matters.

On the occasion of Mr. Alrich's first appearance, it seemed that the only object of his testimony was to have him identify certain drawings which he had made or caused to be prepared showing in pink complainant's property. At a later hearing he was recalled. It then developed that the real reason for producing him was to have him testify to the property claimed to be used and useful by complainant in its business of making and distributing gas. Still later he was called to testify to plant and equipment withdrawn from service.

When Alrich first appeared, the following occurred:

> "Mr. Ransom: I offer in evidence, this schedule showing the lot numbers as given in the Real Estate Map and the corresponding lot numbers from the official tax map for 1919.
>
> * * * * * * *
>
> The Master: The paper you are offering, as I understand it, Judge Ransom, is a schedule prepared by this witness giving first the block and lot numbers as they appear on Exhibit 178?
>
> Mr. Ransom: Correct.
>
> The Master: And the same property with the block and lot numbers as they appear in the Real Estate Map for the City of New York for the year 1919?
>
> Mr. Ransom: 1919, yes—where they have been changed.
>
> The Master: Where there is no change. It appears in this that there has been no change, and where there has been a change in identifying numbers it so appears.

By the Master.

Q. Was this schedule prepared, Mr. Alrich, as the result of your inspection of the City's tax maps? A. I prepared it myself from an inspection of the tax maps.

Q. That is what I mean; you saw the tax maps? A. I did.

Q. And you compared the lots with the tax maps numbers? A. I did.

Mr. Hayward: For what year?

The Master: For this year, 1919. Any objection, Colonel Hayward?

Mr. Hayward: Yes; it is objected to as having no probative value of any character.

Mr. O'Brien: I would like to know why it is offered.

Mr. Ransom: Merely for convenience of identity.

The Master: *It is offered by the expert as to value,* that is all, I suppose.

* * * * * * *

Mr. Chambers: I object to it as incompetent.

Mr. O'Brien: Mr. Master, I don't see why it is necessary to have expert testimony if they have the property in here diagrammed in an exhibit.

The Master: Any objection to this exhibit?

Mr. O'Brien: I would like to know its purpose. I may have an objection or I may not.

The Master: I am not going to require counsel to state in every instance the purpose of the offer, and I won't in this instance. The paper was offered in evidence and it is said to be a schedule. If you do not understand what the paper is, I will let you see it, of course.

Mr. O'Brien: I have seen it.

The Master: I am not going to ask counsel to state the purpose of it. But will you state your objection?

Mr. O'Brien: Well, frequently——

The Master: I am not going to; I am not going to spend the rest of my life listening to statements of purposes.

Mr. O'Brien: Frequently we will have to call upon him for statements of purposes.

The Master: Just now I am not going to permit any statement or any further discussion. Is there any objection?

Mr. O'Brien: Then I object to it * * * as incompetent, irrelevant and immaterial" (Rec., pp. 233-5).

"Q. Now, I direct your attention to the first map, being Exhibit 178, the Hester Street property——

Mr. Hayward: If the Master please, before that I would like to have the Master inquire of counsel whether he expects to give us some satisfactory proof about this building that he has just gone from the cellar to the nineteenth floor of, in regard to some concrete figures as to the use of this building, the quality of the space used, where different tenants use it, as to light and location, proximity to the elevators, access to the elevators, etc. In other words, such things as ordinarily determine the value of space in similar buildings.

The Master: No, I won't make any request of that kind of counsel" (Rec., p. 253).

"Q. Is the gas from that holder distributed only to the consumers of the Consolidated Gas Company?

Mr. Ransom: I object to the question, as not within the scope of the direct examination. It is a matter of distribution which we shall have to handle by other witnesses.

The Master: If the witness knows, I will let him answer.

Mr. O'Brien: May I at this point, ask counsel to state why this witness was produced?

The Master: No, you may not ask that question.

Mr. O'Brien: It is a fair question, your Honor.

The Master: I won't permit it to be answered.

Mr. O'Brien: *It might regulate the extent of the cross examination.*

The Master: No, he has testified to certain matters on direct, with reference to which you will have the right to cross examine him.

Mr. O'Brien: Well, that is frequently stated by counsel in this class of cases as a guide in the matter of arrangement of cross examination. If he is here just to give us the title page of this little book that is about to be created in this trial, your Honor, of course we would not need to spend much time with him; but, if they are relying on this witness and his testimony to show that all the property within the dimensions described in these diagrams is actually used and usable for the purpose of making gas of this company, it is another question.

The Master: I have made my ruling, Mr. O'Brien.

Mr. O'Brien: That is the reason I asked the question, because it will save a good deal of time. If he is a witness on that point, he will need a thorough cross examination.

The Master: I have already ruled on that.

Mr. Chambers: Your Honor, Judge Ransom at folio 967 opened the door when he asked the question: 'What use is made of them by the Consolidated Gas Company'?

The Master: I have ruled on that matter. If you know, you can answer the question.

A. May I have the question?

Mr. O'Brien: Did I understand counsel to

decline to state the purpose, or did your Honor give him a chance?

The Master: I decline to let counsel state it and will not permit any further question. My understanding is, when a witness is called, he is called to answer questions in regard to what he is called about.

Mr. O'Brien: Does your Honor rule that we may not ask counsel what the purpose of his examination is?

The Master: Yes" (Rec., pp. 410-12).

"Q. Could you (Mr. Alrich) say what gas had been made in the 14th and 42nd Street plants in the years 1916, 1917 and 1918?

The Master: That question is ruled out.

Mr. Chambers: I know, your Honor, but there was no objection.

The Master: I am objecting to it. I think the judge or referee who sits here like a graven image *and does not use his brain*, does not take the proper position. *I am running this case.*

Mr. Chambers: I know, but your Honor may not know what is back of our inquiry.

The Master: I know what the line is" (Rec., p. 775).

Evidence of the perfect co-ordination between the Master's brain and tongue appears on almost every page of the record.

At a very early stage of the trial, the Master announced:

"The Master has rights here that counsel has not. *The Master always has the right to interrupt*" (Rec., p. 249).

We submit that this is not an accurate statement of the law in American courts. In this country there are limits to the right of a Master or any other judicial officer to interrupt counsel and witnesses. That a judge may

interpose when there is some useful purpose to serve is willingly admitted. But in the instant case, the Master's interferences were so frequent that the proceedings resemble a lively and indecorous debate rather than a trial marked by the dignity which usually pervades the court room.

"Q. When you (Mr. Alrich) were qualified here as a witness, you stated certain experiences you had had as a gas engineer in building gas works, but you did not mention any of these companies. Why was that?

The Master: You need not answer that. That does not get us anywhere. He did not mention it; that is the answer.

Mr. Hayward: Don't you think it touches his credibility, the question of frankness and fairness?

The Master: The way I look at it, it is not a question of disputed facts as to what somebody said out on the corner of Barclay Street and Broadway. Before this case is finished, this record will be pretty nearly complete as to just what structures there are on these various properties, and that is all this witness's testimony amounts to. I don't think you get anywhere by attacking the credibility of the witness.

Mr. Hayward: But, here is a witness who takes the stand and attempts to enumerate—and to my belief at the time and to your belief at the time—to enumerate his entire experiences with the gas company and his structural work with gas companies. Now here we find, quite by chance and by investigation outside of the court room, *a vast amount of work that this witness has done in Consolidated Gas Company's time for other companies.* It seems to me it is important to show, if possible, what the motive of the witness was in concealing all this other work that he has done. It touches directly his credibility as a witness and his frankness with the Master.

The Master: Don't you see that you have brought out the fact, and that it carries with it, its own inference?

Mr. Hayward: We have a right to ask the witness on cross examination why he omitted it.

The Master: You and I can draw inferences from it, from the point of view which we look at it.

Mr. Hayward: But we want to ask him further questions, from which you can draw further inferences, which we have a right to do.

The Master: I will not permit this question" (Rec., pp. 1054-1055).

Aside from the right to cross examine Alrich as to his credibility, there is another aspect in which the Master's exclusion of the questions addressed to him must be viewed. Alrich's salary is included as part of complainant's operating expenses. It was proper to inquire how much of his time he devoted to the work of other companies so that a correct allocation could be made of his salary between complainant and those companies. This allocation was not only not made on complainant's books, but Alrich admitted that he did not keep any record of the time which he devoted to complainant's affiliated companies.

"Q. From the work that you (Mr. Alrich) say you did at Yonkers, are you able to tell us how gas is furnished by complainant to the Yonkers Company?

The Master: You need not answer that question.

Mr. O'Brien: Your Honor, this is very important.

The Master: I know it is important, but this is not cross examination.

* * * * * * *

Mr. O'Brien: This goes directly to the question as to the use of the properties of the complainant. If the witness is not acquainted with the amount of gas furnished and the way it is furnished to the Westchester Lighting Co., then he can easily say he doesn't know.

The Master: I am not going into that with this witness.

Mr. O'Brien: But this goes directly to the use of the property.

The Master: I am not going into it with this witness.

Q. Will you say that the holders and the mains connected with the holders in the Sedgwick Avenue station are not used partly for the purpose of furnishing gas to Yonkers?

The Master: The question is not allowed. It is not proper cross examination of this witness.

Mr. O'Brien: Exception.

Q. Will you state what amount of gas and to what extent the holders at the Sedgwick Avenue station are used for furnishing gas to any other companies outside of the City of New York?

The Master: The question is not allowed.

Mr. O'Brien: Exception.

Q. Will you state whether the work you did at Pelham was on the main system of that plant or with respect to the governor house of that company?

The Master: He has already told us what he did.

Mr. O'Brien: Exception.

The Master: You have brought out the point that he spent a lot of his time on the plants of other companies.

Mr. O'Brien: *This all bears on the question of the use of this company's property.* Your Honor will see that if he comes in here and gives

us a statement which by presumption and inference, and by its direct effect indicates, say for illustration the station at Sedgwick Avenue, indicates that it is entirely and exclusively used by the complainant company for furnishing gas to its consumers, *while the fact is that it is used in part for these other purposes, for furnishing gas to Yonkers and other places, these questions all bear directly upon the question of the use of the property.*

The Master: I am perfectly clear in my mind, and I am going to insist on it, that these examinations and cross examinations shall proceed according to the rules of evidence. I am likewise clear in my mind, that if when this case is closed, it becomes necessary to recall this or any other witness to make perfectly clear upon this record, and to the satisfaction of the Master, the fact to be determined, the witness will be recalled. We will go through with it by proceeding in accordance with the rules of evidence.

Mr. O'Brien: May I ask counsel, through the Master at this time——

The Master: No, you cannot make any more inquiries of counsel, I will not permit it.

Mr. Hayward: *Has not the witness testified that everything shown in pink is used exclusively for the purpose of this company?*

The Master: His testimony is what it is. I have made my ruling and I think I have made my position perfectly clear" (Rec., pp. 1059-1061).

"Plant Withdrawn from Service" is an item of considerable importance. Cross examination of Carter revealed many pieces of property long since retired but included in Complainant's Exhibit 496 presented by Carter and containing, among other things, the company's fixed capital account. In these circumstances, it would seem that defendants were entitled to the widest latitude in

cross examining Alrich, who was one of the engineers who made examinations and investigations for the purpose of ascertaining whether or not plant and equipment should be reported ready for retirement. It is no answer to say that the subject was covered by Carter's cross examination. Carter's information on the subject was derived from the company's engineers of whom Alrich was one.

The Master's error in refusing to permit defendants' counsel to cross examine Alrich is aggravated by the fact that he and Judge HAND included items admitted by Carter to have no proper place in the company's fixed capital account.

The colloquy between the Master and counsel for the defendant Swann is so typical of the Master's attitude that its insertion here will be helpful in understanding defendants' claim of unfair trial:

> "Q. Mr. Alrich, can you say why you did not testify when you first went on the stand and were examined concerning your work, that part of your work since you have been with the company consisted in making reports upon pieces of equipment withdrawn from service?
>
> The Master: The question is not allowed.
> Mr. O'Brien: Exception.
>
> Q. Did you not represent at that time that your work was entirely in the construction department?
>
> The Master: Question not allowed. I think I will excuse Mr. Alrich. I don't see any sense in keeping this witness here any longer. Wait for one more question and see if there is anything else.
>
> Mr. O'Brien: Your Honor, to cover this branch of the examination and not face repeatedly the ruling you have made of 'question not allowed,' I desire to say so that you may rule with a general ruling and save that much

time, that I intend to go through with my cross examination of the witness on the whole subject of this Exhibit 367, asking him as to each particular item entitled 'Estimate by Company's Engineer,' or in almost similar language whether he was the engineer, where he got the figures upon which he based the estimate, whether the figures are in this particular amount in the books, or whether they have been subjected to adjustment or calculation by the witness Teele before finding that place in this exhibit, how much of the original estimates were made by him, based upon positive actual data, and how much was made the subject of either guesswork or calculation or assumption as to the value of the piece of property in question at which it was to be written up as a withdrawal.

Further, to get specific information from the witness as to the records made by him at the time he reported the withdrawal of a piece of property so as to bring out whether or not there is a positive report made that the property was physically withdrawn as of a certain date, or whether that was left to monthly or yearly, or annual adjustment through reports embodied in the journal or in the operating ledgers of the company.

Further, to find out from the witness whether or not he got up tentative reports upon these matters which were turned over to the witness Teele and made the basis of this exhibit. Whether or not he confirmed the figures as taken from the books of the company, and whether he made any corrections in those figures.

The examination will proceed further to the extent of finding out to what extent counsel for the complainant went into the conferences when these exhibits were gotten together, how much of a part was played by Mr. Carter in

adjusting these figures, reviewing them, correcting them, modifying them, and so on.

Now, that is the scope of the examination, which only describes in general terms what I have in mind, but it will give you some idea of the examination which I desire to enter into at this time, continuing along the lines already indicated. I state it thus because I do not care to face a continual volley of 'objection sustained,' or 'I won't allow the question,' and have the record lumbered up with a number of exceptions on my part.

The Master: Nothing that you have said changed my view about the situation. Have you any other questions?

Mr. O'Brien: I note an exception to your Honor's ruling with respect thereto. Now, Exhibit 376——

The Master: Unless you have got something entirely different from the line of questions you have been asking, you will be wasting time on Exhibit 376.

Mr. O'Brien: May I request of your Honor leave to have the witness appear day after tomorrow so that I may have an opportunity to read the testimony that he gave today?

The Master: No, I won't do that.

Mr. O'Brien: It may save the time of the Court.

The Master: No, I won't do that at all. I adhere to the ruling I made a long while ago, that if at any time you can show me some pertinent, material, useful question that you want to put to any witness who has been on the stand, I will bring him back, but you have to show me first that the inquiry that you want to pursue is useful.

Mr. O'Brien: Your Honor, here is the view I take of the testimony given this morning: Where there were matters that were more or less formal, like the attempts to correct tax maps, I did not deem it necessary to go much

into detail; in fact, as you will recall, I haven't asked any questions about it. But, just near the close of the witness's direct examination this morning he was asked questions that indicated to my mind that he was brought to this stand to correct the defects in the witness Teele's examination. I recall the fact that when I endeavored to get from the witness Teele the names of the engineers, to get some detail as to the various items, 'Estimates of Engineers,' that your Honor overruled and would not allow the questions of that kind to be put by me to the witness Teele. Now it appears that counsel for the complainant, appreciating that that is an entirely unproven branch of the witness Teele's exhibit, has brought on this man to prop it up, and they have asked him two or three questions, blanket questions to make their record, and I assume that they have done it with the hope that we would not, because he only asked a few questions on it, that we would pass over that very, very important matter without a careful cross examination. Now, I can do that, perhaps, in a briefer time if the examination of the witness is deferred until day after tomorrow.

The Master: If you have any other questions to ask you had better ask them.

Mr. O'Brien: I except to your Honor's ruling that I may not have further time to review the record and see just how far I will cross examine the witness.

The Master: Have you anything particular in mind that you want to ask about Exhibit 376?

Q. Did your statement as to——

The Master: No, I am asking you something. Have you anything in mind that you want to develop?

Mr. O'Brien: Some of the questions will be a little different.

The Master: What point do you want to talk about, what do you expect to develop?

Mr. O'Brien: I want to find out just what I found out with regard to the other exhibits.

The Master: I am not here to find out things. I am here to let you bring out facts that you have in mind, that you want to develop. What do you want to develop?

Mr. O'Brien: I want to develop how long this witness has been on this work, when he undertook to refresh his memory as to things that were in use, equipment that was discarded at various times during 1906. I want to find out where he got his data from. I want to find out how much of the data embodied in the several exhibits we have referred to today is based upon original reports made by this witness Alrich to the Engineering Department or to the Accounting Department, what part of it is dependent upon reports made by other engineers, some of whom may still be in the employ of the company, and to determine in that way whether or not the original reports are in existence.

The Master: I will not allow those questions.

Mr. O'Brien: By which we may check up the figures that finally found their place in Mr. Teele's exhibits. Then in regard to Exhibit 376, I want to find out from the witness whether he also went over and checked up this expert accountant's figures, why they did not rely upon Mr. Teele's own calculations, and why they resorted to have Mr. Alrich go over his work and review it as a comptometer.

The Master: I think I will excuse Mr. Alrich. You can go.

Mr. O'Brien: That is the scope of examination——

The Master: The witness is excused.

Mr. O'Brien: The others will appear as I go through the exhibits in question.

The Master: The witness is excused.

Mr. O'Brien: I except at this time and protest against not being allowed further cross examination of the witness.

The Master: If you can show me, before the complainant closes this case, that there is some witness that you want to ask some useful questions, I will call him back.

Mr. O'Brien: I note an exception and record a protest on the part of the defendant Swann" (Rec., pp. 8005-10).

The following is a typical illustration of the Master's impatient insistence upon his own point of view, and his arbitrary interference with cross examination by counsel. Constant interruptions of this character by the Master prolonged the trial and unnecessarily swelled the volume of the record:

"I got the impression from Mr. Brundage's testimony that he does not think there are any items in the journal dealing with labor. Am I correct in that impression, Mr. Brundage?

The Witness: No, that is not true, your Honor.

Mr. O'Brien: He does not mean that, your Honor.

The Master: *Will you let me alone for a minute*? Now, will you run through it and see if you can locate some particular items that we can talk about?

The Witness: Yes.

Mr. O'Brien: Turn to any cartage account.

The Master: Is cartage a labor item?

The Witness: *Cartage has labor in it*" (Rec., p. 1926).

The Master then unsuccessfully attempted to justify his interruption by lecturing defendants' counsel upon the way in which the cross examination should have

been conducted. The necessity for the cross examination, however, is emphasized by the following:

> "The Master: Can you trace one payroll item classified in that payroll sheet?
> The Witness: No, I cannot" (Rec., p. 1934).

During Mr. Brundage's cross examination, defendants' counsel endeavored to have him give the status of the fund represented by the moneys which had accumulated as the result of complainant's collection of a rate in excess of the statute during the pendency of the prior suit. Although complainant's counsel stated he had no objection to this line of inquiry the Master would not permit it, offering as the reason for his ruling, the extraordinary statement that if the Court supervised the payment of the money, defendants' counsel could examine the Court's order and procedure and find out for themselves what had been done (Rec., pp. 2943-8).

The Master likewise refused to permit defendants' counsel to question Mr. Carter on the same subject.

> "Q. Do you know when the Consolidated Gas Company obtained the interest, or whether the Consolidated Gas Company obtained any interest on the amount rebated after the United States Supreme Court decision upon the last trial?
>
> Mr. Vilas: I object to that.
> The Master: Objection sustained.
> Mr. Chambers: Well, it applies to working capital, and so forth.
> The Master: Objection sustained.
> Mr. Chambers: Will you state why you won't let us show that?
> The Master: Because I am through with ancient history.

* * * * * * *

Q. Did you pay the consumers any interest on the amount collected in excess of the 80-cent rate?

The Master: Same ruling.

Mr. Chambers: Exception. Will you state why you won't let me show that?

The Master: No.

Mr. Chambers: Exception to that. I ask the Court to allow the evidence to be taken, so we can show whether they did get any interest or not, or paid any interest.

The Master: I will not take it. It is time we stopped wasting time in this case. It is quite apparent to me that this whole case turns on a question of law. Let us get it on the record and get through with it" (Rec., p. 11483).

Evidently the Master was so thoroughly convinced of the correctness of his rulings, that the heavy burden of expense imposed upon the parties by his errors gave him no concern.

"Q. (To Mr. Brundage.) And is there a separate record kept of the labor and material bills incurred in connection with appliances?

The Master: Objection sustained.

Mr. O'Brien: Your honor, I suppose, assumes that your two questions asked the witness, cover all these matters, but I don't think they do.

The Master: I shall rule that you, having made a record that there is an appliance business to which a good deal of time is devoted by men on the general payroll, the appliance business, utilization department, and the work done in inducing people to use more gas and to the selling of appliances for that purpose, is all a legitimate part of the gas business.

* * * * * * *

Mr. O'Brien: Well, I am saying to your Honor that you are putting this case out of court when you make that ruling.

The Master: Well, then, *it is out of court and the quicker it gets out of court the better I will like it.*

Mr. O'Brien: Well, that is what it means.

The Master: *Well, that is what I am going to report as my opinion, and you will have to get some other judge to reverse me*" (Rec., pp. 5956-7).

"Q. Will you (Mr. Brundage) tell what, if any, of the expenditures recorded in this miscellaneous expense account running from pages 877 to 884, inclusive, in the operating ledger B are made on an O. K. from Mr. Carter's office?

The Master: Objection sustained.

Mr. O'Brien: Exception.

Q. What of all of these expenditures on the pages I have given in full are made on executive order of the President of the Corporation?

The Master: Same ruling.

Mr. O'Brien: Exception" (Rec., p. 6060).

As we shall show later, the Master assumed the same attitude in regard to expenditures paid on executive order when defendants' counsel endeavored to elicit some information about them from Teele. Many of these expenditures were for "publicity" and are challenged by defendants as not proper charges to the business of making and distributing gas. They were not proven. When Livingston, complainant's publicity agent, was called by the defendants, he admitted that it had been his habit for the last 15 years to destroy vouchers approved for payment to him.

"Q. (To Mr. Brundage.) You have here (voucher) Farmers' Loan & Trust Company,

$2,000, for services registering stock. What stock is that?

The Master: Objection sustained.

Mr. Chambers: How are we to know what stock it is? I cannot possibly see how we can determine this case without some light on that.

The Master: Objection sustained.

Q. Is it the stock of the Standard, or the New Amsterdam, or this company? It is charged to operating expenses.

The Master: Who is the stock registrar for the Consolidated?

Mr. Chambers: I don't know. This is the Farmers' Loan & Trust Company.

The Master: Suppose you find out.

Mr. Chambers: I except, if your Honor will not allow us to show. We don't know what it is. It is $2,000, and there is a whole string of them here. It is just for a month, too, that I am speaking about.

The Master: Is the Farmers' Loan & Trust Company your registrar?

The Witness: They are.

Mr. Chambers: Of course, that would be an operating expense——

The Master: I don't care, for the purpose of my ruling, whether it is or is not. My ruling is based on the fact that I can see at once that it is a monthly charge for account as registrar, and I asked Mr. Brundage the question to make sure. There isn't any question in the world about it.

Mr. Chambers: Maybe that company is registrar for the Standard. You might ask him that.

The Master: Oh, yes, they may be registrar for the United States Steel Company.

Mr. Chambers: That might be Standard stock.

The Master: Why in the world would the

Consolidated be paying them as registrar for the Standard?

Mr. Chambers: They own 99 per cent. of it.

The Master: Yes, but they keep different books.

Mr. Chambers: It might be the Astoria Company, which they own and control. It might be the Edison Company.

The Master: Let us get on to something else.

Q. Now, this charge for the restaurant, $136.47——

The Master: Objection sustained.

Q. Stockholders' meetings of the Consolidated?

The Master: Objection sustained.

Mr. Chambers: It does not show of what stockholders' meeting it is.

The Master: Objection sustained.

Q. Now, the change to Bradstreets; is that a subscription to the Consolidated Gas Company?

Mr. Ransom: Objected to.

The Master: Objection sustained.

* * * * * * *

Q. You have a charge here under this same heading, 'Miscellaneous General Expenses,' 'Publicity Expenditure,' again for Livingston. How are these apportioned?

The Master: Objection sustained" (Rec., pp. 6143-5).

A necessarily important detail of the cross examination of such witnesses as Brundage and Teele was that which was directed to vouchers, particularly those which upon their face convey no meaning to the stranger. Assuming, without conceding, that defendants' accountants should have gone to complainant's office and conferred with its representatives about the books and their

supporting data, there were numerous occasions when Teele himself was compelled to have complainant's officers and employees explain vouchers, reports and other data. In these circumstances, there does not seem to be any good reason why the Master should not have permitted the widest latitude in cross examination. But aside from all this, defendants' counsel were entitled to have the version of the witness under cross examination. Cross examination which goes to credibility, not only of the witness but of papers for which he vouches, is always permissible, subject to the only limitation that it is not to be pushed to the extent of abuse. These observations apply with peculiar force to the situation in the instant case. We have here a decree which is supported by a meagre minimum of testimony. Complainant's main reliance is upon its books. Cross examination of the only two witnesses who were produced as to those books should have been fairly free and unrestricted. Instead of that, it was impaired and impeded by the Master's utterly unjustifiable interference.

When Mr. Teele, an accountant employed by complainant to make tabulations from its books, was under cross examination, defendants' counsel called for certain vouchers. The Master declined to direct their production and made the extraordinary ruling that the question of whether or not the vouchers be produced in court was in the discretion of complainant's counsel.

In *Northern Pac. Ry. Co.* v. *Keyes*, 91 Fed., 47, not only were all the vouchers produced in court, but the railway company's department heads voluntarily appeared, took the stand, swore that they had examined the vouchers, and thus gave the State's attorney an opportunity to cross examine.

> "Mr. Chambers: We have asked for certain vouchers, just a few of them.
>
> The Master: What do you want them for?

Mr. Chambers: I want to examine the witness about them.

The Master: What do you want to ask him about?

Mr. Chambers: I don't know yet.

The Master: I shall not direct their production unless you can tell me some specific purpose as to matters brought out on direct.

Mr. Chambers: Then I will tell you.

Mr. O'Brien: I ask, for the purpose of my cross examination of Mr. Teele, that the complainant produce the operating ledgers A and B for 1918; the operating journal for 1918; the accounts receivable; reports of the branch offices for 1918; the reports of rented appliances sold in the district for 1918; the reports of appliances sold of the stock for 1918; monthly reports of appliances condemned and destroyed for 1918; branch office and repair, shop inventories, May and November, 1918.

The Master: What do you want all that for?

Mr. O'Brien: That they also produce——

The Master: What do you expect to bring out from the witness by them?

Mr. O'Brien: I expect to show that he is unreliable as a witness; that he was in no position to test the accuracy of the record; that he has depended upon matters extraneous to the case, and various other matters that will tend to shake his standing in this case as a witness; and I want to further request—this need not be for the first day but they can get it together—that they bring into court the underlying records that were the subject of the witness's test of the reliability of the payrolls and time tickets at the stations, the receipt of coal and oil at the stations.

The Master: Anything else? Do you want all the vouchers?

Mr. O'Brien: The original vouchers and the underlying records by which he (Teele) made his tests of the branch office.

The Master: Don't you think they had better move the Gas Company down here?

Mr. O'Brien: No, that will not be necessary, your Honor.

The Master: You can put your request upon the record and counsel for complainant will bring down *such matters as he thinks it is feasible to bring down. I will not make any direction with reference to it.*

Mr. O'Brien: Your Honor will recall, when Mr. Teele was on the stand a few days ago, your Honor at page 2036 directed him to make further tests and you confined it there to certain brief periods and the witness said he thought he could do that in two or three days. Then he subsequently appeared on the witness stand and said that he had made those tests. I want those papers that he made as a basis for those tests. They will not need a van to bring them down.

The Master: What do you expect to show by it?

Mr. O'Brien: I want to examine this witness to see the tests he made.

The Master: *I will not make any direction on the subject.* * * * The trouble with the situation is, that I would be inclined to direct that the vouchers Mr. Chambers wants be brought down, but then I am met with the situation that Mr. O'Brien will say, 'Well, I want all the rest of the Gas Company down here.' I am not going to make any direction at all about the production of those things at this time.

Mr. O'Brien: I have been specific as to the things I want.

The Master: I don't believe that I am going to permit you to cross examine this witness any further as to the accuracy of the statements or what he did.

Mr. O'Brien: All right, your Honor, I have made my demand.

The Master: Yes, it is on the record for whatever it is worth" (Rec., pp. 6387-6391).

"Q. Shearman & Sterling appear in this right along pretty regularly. What was that, legal expenses? A. Expenses in connection with the prosecution of claims and arrears and the settlement of claims and arrears.

Q. Some back claims, I suppose? A. The vouchers will show.

Q. Claims for other years—back years, was it?

Mr. Ransom: I object to the question. The vouchers speak for themselves and the vouchers have all been gone over by the defendants.

The Master: I will let the witness state, if he knows.

A. I don't know without referring to the original vouchers, how many claims were instituted.

Mr. Chambers: I would like to have counsel produce voucher No. 9451.

The Master: For what purpose, Mr. Chambers?

Mr. Chambers: To see what it does show.

The Master: *Look at it up there.*

Mr. Chambers: I do not have any time.

The Master: Have somebody else go up and look at it for you. That is the whole purpose of giving you and your men access to all the vouchers *up there*, so as not to have this happen down here.

Mr. Chambers: Also voucher No. 9062.

The Master: The Master directs counsel to look at it himself or have some of his engineering assistants look at it up *at the Gas Company's office*, where they have been subject to inspection, more or less.

Mr. Chambers: Exception" (Rec., p. 6431).

Although many of the Master's findings are based upon Teele's tabulations and have nothing to support them except said tabulations, the Master frequently stated he would not take Teele's judgment as to the propriety of,

or the necessity or reason for, any of the figures in complainant's books (Rec., pp. 6336-9, 6363-4, 6487, 6501, 6521, 6566). The Master evidently regarded this statement as conclusive of defendants' right to cross examine Teele on many of the items contained in his schedules. Defendants were entitled to know the sources of Teele's figures, and especially if the bases of those figures were oral information conveyed by some officer or employee of complainant rather than written reports or other memoranda. It is not to be supposed that defendants were concluded by Teele's statement that many of his figures were the result of conversations between himself and the company's engineers. But the Master held otherwise.

> "Q. Take the Inwood station information that you have here in this Exhibit 185, p. 88, that part which is set forth after (1) 'Additional valve house connections.' What information did you have before you to determine that that additional valve house connection was a capital investment as distinguished from a repair?
>
> The Master: Objection sustained, upon the ground that the witness has repeatedly stated that he took the statement of the engineers in every instance for that information.
>
> Mr. Chambers: Well, he said sometimes——
>
> The Master: He said he looked at vouchers and he felt satisfied that every one of them was right, and I have told you time and again that I do not care about his judgment.
>
> Mr. Chambers: I have looked at the record and I can't see how I can escape asking him questions about each item, in view of his indefinite statement.
>
> The Master: I will sustain the objection upon the grounds stated.
>
> Mr. Chambers: Exception" (Rec., pp. 6539-40).

"Q. You did not see fit to use the figures here in the ledger, $134,775.09 for coal used at the 99th Street station as it stands in the ledger, did you?

The Master: Objection sustained.
Mr. Chambers: Exception.

Q. And you did not see fit to use the figure, $624,688.70, found in the ledger for the 21st Street station?

Mr. Goetz: Objected to.
The Master: Objection sustained.
Mr. Chambers: Exception.

Q. Why was it you did not use these figures?

Mr. Goetz: Objected to.
The Master: Objection sustained.
Mr. Chambers: Exception.

Q. You did not use the figure, $3,073.35 found in the ledger for coke, did you?

The Master: Objection sustained.
Mr. Chambers: Exception.

Q. And, likewise, you did not use the figure, $17,233.58 for coke used at 21st St. station?

The Master: Same ruling.
Mr. Chambers: Exception.

Q. Did not those four amounts which I have given, reflect the cost of coal and coke, and the labor in handling same at those two stations?

The Master: Same ruling.
Mr. Chambers: Exception" (Rec., pp. 6262-3).

"Q. Did you ascertain what the item, advertising, was for?

The Master: Objection sustained as not useful cross examination. I assume it was to advertise • • • the use of appliances.

Mr. Chambers: It is not. Now, if your Honor is going to decide this case on what you

assume—what is the fact about newspaper advertising? What is it for?

The Master: Have your experts had access to the records?

Mr. Chambers: Well, when you find vouchers like Neil Towner, what information does that give as to what it is for?

The Master: Isn't it perfectly easy for you to call for such vouchers as will show the point you want to bring out?" (Rec., pp. 6331-2).

"Q. Now, the item for operating general office building: what was that for?

The Master: Objection sustained. It says for operating the general office building.

Q. Did you examine anything in addition to the vouchers, to ascertain that this was a distribution expense?

The Master: Objection sustained, upon the ground that the witness has told us in great detail how he made his examination.

Mr. Chambers: Exception.

Q. Why did you put that in here as an operating expense?

Mr. Ransom: Objected to.

The Master: Objection sustained. The witness's judgment was, that it was an operating expense, with which you and I may or may not agree.

Mr. Chambers: The Master is testifying for the witness; the witness has not said that yet.

The Master: Well, I am saying it" (Rec., pp. 6333-4).

All attempts to elicit from Teele what investigations he made concerning complainant's "publicity" expenses were rendered fruitless by the Master's rulings. Teele was not permitted to state whether or not he had examined the vouchers relating to publicity expenses, the

Master evidently feeling that as Teele had previously stated he had examined *all vouchers*, consequently he must have examined the particular vouchers about which defendants sought information (Rec., p. 6350). When defendants' counsel called for these vouchers, the Master made the extraordinary ruling that as the vouchers "are all up at the (gas company's) office and subject to inspection, *they are all produced*" (Rec., *Id.*).

The Master also refused to permit Teele to state

> whether he had made inquiries "outside of the voucher as to why the company had made this expenditure" (Rec., p. 6350);
> whether he had consulted with Mr. Carter or anybody else "as to what this expense was for" (Rec., p. 6351);
>
> if he had examined the executive order of the president, Mr. Cortelyou, authorizing these expenditures" (Rec., p. 6351);
>
> if he had talked to Mr. Cortelyou about it (Rec., p. 6351);
>
> how many expenditures under the heading of publicity expenses he found were made pursuant to an executive order (p. 6351);
>
> if there was any receipt for any part of this publicity expense signed by Mr. Livingston (complainant's "publicity" agent) (Rec., *Id.*).

The following is a good illustration of the Master's cocksure attitude about matters which required explanation.

> "Q. Now, take this item for "Meeting Fees," $13,941.12——
>
> "The Master: What is that, Mr. Teele? I don't quite understand what that is?
>
> The Witness: Perhaps I can give you the detail of it. (Witness consults memoranda.)

It is the fees paid to directors at their meetings, etc.

Q. Where did you get that information from?

The Master: Objection sustained.

Mr. Chambers: He didn't get it from the vouchers. All right, if your Honor sustains them all.

Q. Did you examine anything outside of the vouchers?

The Master: Objection sustained.

Mr. Chambers: Your Honor, we are very much in the dark about this. It does not show at all what it is.

The Master: *The Master is perfectly clear about this.* The witness has told us over and over again that he either looked at vouchers or looked at payrolls, or looked at journal entries, or looked at one thing or another. *If there are no vouchers for this he got it from the journal entry or from the payroll.*

Mr. Chambers: How does he know it was for fees paid to directors?

The Master: Because it is so charged.

Mr. Chambers: Oh, no; show me. I would be tickled to pieces if you would show me.

The Master: It is in the book somewhere or he would not show it.

Mr. O'Brien: The trouble, your Honor, is that you are in a lot of errors——

The Master: You are afraid I am in a lot of errors. The important thing is whether my result will be an error.

Mr. O'Brien: *You cannot take a blanket statement by a witness that he examined vouchers, or the journals, or other papers, and checked this thing up and found them correct.*

The Master: Well, I am taking it.

Mr. Ransom: It is called 'Meeting Fees' right on the face of 1030 and 1031.

> The Master: Next question. If there is any error in the record I am assuming responsibility for it, and so is counsel for the complainant.
>
> Mr. Chambers: Yes, he is. I find no vouchers at all for any of that expense, 'Meeting Fees'" (Rec., pp. 6356-7).

In view of the fact that the Master based his findings upon Teele's tabulations despite his constantly repeated statement that he took them merely as figures copied from the company's books, cross examination on the question of whether or not Teele had used his judgment as to the propriety of any expenditures or as to his inclusion of items in one account as compared with another, was entirely pertinent. But the Master would not permit defendants' counsel to cross examine Teele on his opinion that the account, "Renewals and Replacements," as set up on page 32 of his exhibit 205 and amounting to the sum of $601,450.69, was kept in accordance with the Uniform System of Accounts (Rec., p. 6368).

Nor would the Master allow defendants' counsel to cross examine Teele as to how he determined between capital expenses and repairs in tabulating the item of "Services of inspectors, company's labor, removing old and erecting new fences and gates and expense of building during construction," or what was the basis of Teele's *determination* that the item, "Rearranging and extending street mains" was a capital expenditure as distinguished from a repair. Other questions of a like character were excluded (Rec., pp. 6532-3).

Although counsel for the defendant Swann properly insisted that he had the right to cross examine Teele as to what directions, if any, he received from Mr. Carter "or some other officer of the company" in the preparation of his tabulations, the Master stated, "I won't allow

it" (Rec., p. 6600). We might safely rest here with the statement that the Master's refusal to permit cross examination along the lines just suggested is of itself sufficient to require the reversal of the judgment. The proposed questions had a vitally important bearing on the credit to be given to Teele's schedules. If the admission of Teele's schedules is to be justified upon the ground of the practical impossibility of proving the case in any other way—and we do not concede this—there can be no question that defendants were entitled to know whether they are an honest transcript of the company's books or contain figures omitted under instructions. The Master, however, was evidently determined to prevent Teele's cross examination upon this subject.

> "Mr. O'Brien: What I want to do and what I insist is my right to do, is to find out just what the plan and scope of his examination of these books was.
>
> The Master: That I won't allow.
>
> Mr. O'Brien: What directions he got from Mr. Carter or some other officer of the company.
>
> The Master: That I won't allow.
>
> Mr. O'Brien: As to what he was to omit and what to include.
>
> The Master: That I won't allow.
>
> Mr. O'Brien: What the scope of the work was, whether he would call it an audit.
>
> The Master: I won't allow it" (Rec., pp. 6601-2).

> "Q. Mr. Teele, in connection with the plan of your work for the complainant company, were you given explicit directions——
>
> The Master: Mr. O'Brien, I don't want another question of that kind asked.
>
> Mr. O'Brien: Wait until you hear the question, your Honor.
>
> The Master: I must have some power to enforce my rulings.

Mr. O'Brien: I will bow to your rulings, your Honor, but——

The Master: It has got to stop.

Mr. O'Brien: When you hear the question you can make a ruling on it.

The Master: But I don't want any more questions of that kind asked. I don't want the time wasted.

* * * * * * *

Q. What instructions, if any, did you receive from the representative of the complainant with whom you made a contract for your work, as to the inclusion within the receipts of the complainant company of certain moneys in the shape of profits or revenues or payments and what moneys you were to exclude from these accounts?

Mr. Ransom: Objected to.

The Master: Objection sustained.

Mr. O'Brien: In that connection, your Honor, the question is designed to go to the proposition as to whether the witness used his judgment on the inclusion of non-operating revenues, non-gas revenues, or whether he took it from somebody else.

The Master: The ruling stands. *I don't care whether he took it himself or from somebody else.* If he has excluded anything, show it to me. *I don't care whether he got instructions*; let us get to it. * * *" (Rec., pp. 6609-10).

"Q. How far did you go into an analysis of the figures given you by the engineers with respect to items on Schedule 6 on which the computations are made of rentals of jointly used facilities?

Mr. Ransom: Objected to.

The Master: Objection sustained.

Mr. O'Brien: Exception.

The Master: I will not let you go into that. Has Mr. Sangster any questions that he has

prepared on that schedule? * * * If he has, I will let you ask him. If he has not, I will not let you ask a question on that schedule * * *. I rule that I will not permit you to ask another question about Schedule 6, Exhibit 205, on the ground that this schedule was exhaustively inquired into by Mr. Chambers. You will have to go to some other schedule.

Mr. O'Brien: *Irrespective of whether my questions cover matters that were not covered by Mr. Chambers*?

The Master: *Yes*, I repeat that if your expert, Mr. Sangster, has anything, any questions that he has prepared for you with reference to any item on that schedule, I will let you ask him.

Mr. O'Brien: I note an exception to your Honor's ruling.

Q. *Mr. Teele, did any officer of the company make a statement to you that this was all that these facilities named in Schedule 6—that they all embraced all of the facilities jointly used*?

The Master: Didn't I talk plain English?

Mr. O'Brien: This is extra to Schedule 6.

The Master: Don't work it in as an extra. It affects Schedule 6. I don't want any questions bearing upon, pertaining, or relating in any way or touching on Schedule 6. Next question" (Rec., pp. 6745-6).

While Mr. Teele was being cross examined by counsel for the defendant Swann, in connection with tabulation of rent from gas appliances, he was asked how many contracts he had examined in the two branch offices which he said he visited. The following colloquy took place between the Master and defendant's counsel:

"The Master: Is there any question as to the accuracy of this figure appearing on the books, Mr. O'Brien? I am prepared to rule out the question, on the ground that it is sufficiently

covered, anyhow, but unless you will tell me that you contend that this figure is wrong, I am going to rule it out on that ground, too" (Rec., p. 6621).

The Master's notion that the subject had been fully covered, appears to be based upon the circumstance that, as Mr. Teele had stated that he had gone into two branch offices, it necessarily followed that he had not visited more than two.

> "The Master: When the witness tells me he went into two branch offices, *I assume he did not go into any more.* When he said that he looked at two or three contracts in one branch office, I assume he did not examine any more, *and there is no use in asking if he examined more*" (Rec., p. 6622).

Numerous questions following the foregoing statement and dealing with the subject of the gas appliance contracts, their number, whether or not an examination of three or four of said contracts was a sufficient check upon the witness's figures, etc., were improperly excluded (Rec., pp. 6623-7).

> "Q. Now, leaving out Exhibit 364 and coming back to Schedule 3 again, and particularly the 21st Street station, water gas tar quantities—have you that before you?
>
> The Master: I sustain the objection to that on the ground that it is a matter of mere computation. If you have a point, bring it out.
>
> Q. Mr. Teele, you cannot find the quantities in the operating ledger——
>
> The Master: Objection sustained as sufficiently covered.
>
> Mr. O'Brien: On his direct examination he says these facts are found in the books. I

want to show that the books do not show quantities.

The Master: The books speak for themselves. You don't have to ask a witness whether a book shows something when the book will show for itself.

Mr. O'Brien: Exception" (Rec., p. 6647).

Assuming that "the books speak for themselves"—and we have shown elsewhere that in many instances they do not—there does not appear to be any good reason why the defendants were not entitled to have the facts spread on the record instead of being forced to prepare computations which could have been made by the witness in less time than the Master consumed in giving directions to go to the books. As none of the books is printed in this record, it cannot be ascertained whether, in this particular instance, "the book will show for itself." While the point may not be of sufficient importance to justify elaboration, it is cited as another example of the Master's fretful impatience with *defendants' counsel*. Almost invariably his demeanor towards counsel for the lighting monopoly was extremely deferential. On one occasion he told him he would let him mark the moon for identification if he could get it here (Rec., p. 1467), and on another, "I will mark anything in the world for identification" (Rec., p. 1099). Defendants' counsel were not so fortunate. Their requests to have certain exhibits marked for identification for the reviewing court's information were brusquely denied. Because of the Master's constant interference, the summations of defendants' counsel are made to read like disjointed and erratic rambles, while complainant's counsel was permitted to make his argument in peace and present his views in regular, consecutive order.

"Q. Does Exhibit 367 include all property withdrawn from service * * * from January 1, 1906 to December 31, 1918?

The Witness: So far as I know, it includes all the property withdrawn from service between January 1, 1906 and December 31, 1918.

Q. Does it include all property that ceased to be used during that period?

The Master: Objection sustained. The witness has already testified that it only includes property reported to have been withdrawn and not property which is not formally withdrawn and the use of which is discontinued or suspended.

Mr. O'Brien: Exception, your Honor.

Mr. Chambers: Now, by sustaining an objection when none was made, you interrupt and spoil what I think is a very useful question.

The Master: But it is covered.

Mr. Chambers: No, we have not cross examined him about this; when in this record has he said it covers property that has ceased to be used?

The Master: I cannot point it out, but it would not be in my mind if it were not said. How would it get in my mind?

Mr. Chambers: Well, I think it is erroneously in your mind.

* * * * * * *

Q. Have you ever testified that it includes—

A. I don't think I have ever testified, because I do not know whether there is any property not in use at December 31, 1918, that has not been retired. I have not made a physical examination of the property.

The Master: Somebody must have testified to it. Perhaps it was in Mr. Simpson's testimony" (Rec., pp. 7367-8).

The item, "Transferred Gas" is one of the most complicated details of complainant's intricate system. Complainant does not make all the gas it sells. It buys some of it from other companies with which it is affiliated. These companies and complainant make common use of the mains through which the gas is distributed to consumers. It may be possible to tell from which plant gas is delivered, and it may be feasible to determine the proper charges for gas sold and delivered by the affiliated companies to complainant and by complainant to such companies. But there is no way in which this information can be gleaned from the record. During Mr. Carter's cross examination, it developed that the figures in the account, "Transferred Gas," which he presented, were compiled by Mr. Nickerson, a clerk in his office. Mr. Nickerson was called by complainant but not for the purpose of giving any testimony about this account.

While Teele was under cross examination, counsel for the defendant Swann stated:

> "I want to cover that (transferred gas), your Honor."

The Master blandly replied:

> "*We know all about transferred gas.* I am not going to decide this case on what they pay for transferred gas. This case has got to be decided on the amount of gas they sell and what it costs to make and distribute that amount of gas, whether they make it or somebody else makes it."

Then, perhaps because he felt the need of confirmation for this extraordinary statement, the Master turned to one of complainant's counsel and asked, "Isn't that so, Mr. Vilas?" With prompt and cheerful obedience, Mr. Vilas answered, "It is" (Rec., p. 8316).

It does not require argument to demonstrate that the

cost of the gas which complainant received from other companies is an important element. This could not be established without an analysis of the books of those companies, and, in addition, competent evidence of the reasonableness of the charges incurred in the manufacture and delivery of the gas to complainant. When these obvious facts were stated to the Master by counsel for the defendant Swann, they were brushed aside as "perfect rot."

On the subject of transferred gas, the Master would not permit counsel for the defendant Swann to ask Teele whether or not he made up the item on Complainant's Exhibit 364, "Gas Transferred from New York Mutual Company, 1,277,804,300 cubic feet," from invoices or from some paper that was handed to him by Mr. Carter (Rec., p. 6885). The Master excluded similar questions relating to the item of 404,927,800 cubic feet of gas transferred to the New Amsterdam Company (Rec., p. 6886).

It is quite likely that Mr. Teele did get his figures from Mr. Carter. It is also fair to assume that Mr. Carter was called to supplement Mr. Teele's testimony on this subject, but when he appeared it developed that the figures on the tabulation he then presented were compiled by one of the clerks in his office.

The Master also declined to allow Mr. Teele to state to what extent he had made an investigation of the gas used by the Consolidated Gas Company itself, for the purpose of setting up his figures or what tests he made to determine the accuracy of the figures in the books as to what gas was used by the company, or what Teele found as the losses of gas due to condensation, etc., set forth on Complainant's Exhibit 364 as 1,180,099,100 cubic feet. The Master's refusal to permit these questions was based upon two fanciful grounds: first, the questions indicated that counsel was on a mere fishing excursion; and, second,

counsel could produce the records and have them marked in (p. 6888).

The limitation of defendants' cross examination to those matters shown by them to be errors in complainant's books is clearly erroneous. The Master attempted to justify this extraordinary ruling by the statement that he had instructed defendants' counsel to have their accountants examine complainant's books and confer about them with complainant's accountant out of court; and, after that had been done, to direct the witness's attention only to those items which defendants' accountants reported required explanation.

The Master stated:

> "The Master: I shall rule and will direct Mr. Teele, for the purpose of saving the time of the Court, and at the same time to give the defendants every opportunity to check up in great detail and at their convenience every item on Exhibit 366, that he put all of this data subject to the examination of the defendants and their experts *at the gas company's office* * * * and that Mr. Teele have one of his men familiar with the data to explain all of this data to the representative of the defendants. Before the complainant's case is closed I will give counsel for the defendants or any one of them the opportunity to recall Mr. Teele for further cross examination, at which time I will permit counsel to spread on the record by direct question with reference to any particular paper or item, any point which they want to develop for the purposes of this case. Under those circumstances I will not permit any further cross examination on Exhibit 366 for the time being" (Rec., p. 6506).

Under protest defendants' counsel complied with the Master's ruling. At the end of the hearing on Thursday, December 4, 1919, the Master adjourned until the fol-

lowing Tuesday, for the purpose, as the Master stated, of having defendants' counsel obtain from Mr. Teele certain information concerning complainant's figures for its general office building and plant withdrawn from service. The Master assumed that the intervening time was not employed by defendants' counsel in the manner in which he had directed. Mr. Chambers endeavored to show that he could not find Mr. Teele on Saturday or Monday, but the Master would not permit him to do so.

"Q. Could you read off what was used in 1907, 1908 and 1909 and running right through what pieces of property you included in that item 'General Office' or are they the same? I want to find out where there is a variance or where you changed?

The Master: This all could have been gotten out without wasting any time in court, Mr. Chambers. * * * You know perfectly well that Mr. Teele's working sheets have been at your disposal.

Mr. Chambers: That doesn't give it.

The Master: It was perfectly easy for you to find out this information and spread it on the record quickly.

Mr. Chambers: Suppose I did. Would I offer it? I guess not. *I want it sworn to by the witness.*

The Master: I know, but it was perfectly easy for you to have gotten the information and get it from him with a leading question, have you included such and such items or have you excluded such and such items?

Mr. Chambers: When could I have done it?

The Master: That is why I adjourned until Tuesday morning to give you a chance to do it.

* * * * * * *

Mr. Chambers: Yes, and we had other things.

The Master: I will not allow the question, if you feel that way about it.

Mr. Chambers: Exception.

The Master: The Master rules that that information should have been obtained from the material accessible and counsel should have been in position to have directed the witness's attention to the information and have gotten it on the record quickly and without wasting time.

Q. Where were you last Saturday and Monday?

The Master: Question not allowed.

Mr. Chambers: Exception.

Q. You were prepared to give me the information?

The Master: Question not allowed.

Mr. Chambers: Exception" (Rec., pp. 8239-8240).

"Q. What did you include in that amount of $875,435.55? A. I included the amount actually charged to Plant withdrawn from Service Suspense, between the dates of November 1, 1918 and October 31, 1919.

Q. Don't you know what plants those were? A. I have not the details of the charges before me.

* * * * * * *

Q. Will you furnish them?

The Master: Not allowed.

Mr. Chambers: Exception.

Q. We would like to have you, Mr. Teele, to give us the plant that you included in this amount?

The Master: The question is not allowed.

Mr. Chambers: Exception.

The Master: You had plenty of time to get it" (Rec., p. 8249).

The Master made the same ruling with reference to every other one of Mr. Teele's tabulations that he did when he spoke of Exhibit 366. The results which flowed

from the Master's insistence upon defendant's compliance with these rulings require the reversal of the judgment appealed from.

The defendants were entitled to inquire fully into the tests adopted by Teele and his assistants in checking the book entries, particularly as none of his assistants was produced and as the Master himself expressed dissatisfaction with the method of checking decribed by Teele, and directed him to make further specific tests. It is no answer to this contention to say that defendants' accountants could have, by their examination of the books, discovered possible errors in Teele's figures. Teele was on the stand and the defendants were entitled to his statement under oath.

Every attempt made by counsel for the defendant Swann to elicit from Teele what tests had been made to determine the reliability of the items in the company's books were defeated by the Master's rulings.

The following questions were improperly excluded:

> "Q. Calling your attention to Schedule 10, page 20 * * * Exhibit 205 * * * I ask you how far your investigation of the underlying records of the Street Department went to determine the reliability of the account in the general books of account covering the distribution of superintendence?" (Rec., pp. 6865-6).
>
> "Q. Did they make tests upon the underlying data at a given Street Department, like Hester Street or 111th Street, or some of the others, and draw a conclusion from those tests as to the reliability of the records in the general books of account covering this branch of expense?" (Rec., p. 6866).
>
> * * * * * * *
>
> "Mr. O'Brien: I except to your Honor's ruling. I assume that your Honor will make the same ruling with regard to inquiries and cross examination——

The Master: I will make the same ruling with regard to every inquiry of that kind as to every item; you have had enough of it, I say.

Mr. O'Brien: In Exhibit 205?

The Master: Yes, and as to every other exhibit, now, too, 355, 354 and 365, all of them. I won't permit any more questions asking this witness what his men did with reference to checking any items.

Mr. O'Brien: Well, it is not confined to that alone. It is hard to describe in a few terms, your Honor, the nature of the inquiry, but the inquiry is what I consider a development of the witness's knowledge of the books that may qualify him or not qualify him to make a statement that the general books of account are reliable.

The Master: I won't permit another question on that line.

Mr. O'Brien: Exception. I am passing over the commercial expenses, assuming that your Honor will make the same ruling, and over each other page of Exhibit 205 up to page 29. Will your Honor permit me to go into the question of insurance, to find out whether the witness has made any examination of the cost of insurance?

The Master: No, I won't.

Mr. O'Brien: The costs that the company might be able to get insurance for if they were insured with another company.

The Master: No, I won't permit it.

Mr. O'Brien: And the development of the——

The Master: He is not here to be questioned——

Mr. O'Brien: And the investigation of the witness as to how far he went in investigating the schedules * * * set forth on page 29 of Exhibit 205.

The Master: I will not, under my ruling.

Mr. O'Brien: Exception.

* * * * * * *

Q. Does not the Public Service Commission require the company to set up a reserve called "Accrued Amortization of Capital," charging operating expenses with the amount estimated to be necessary to cover depreciation on a uniform annual basis and auditing the annual installment to the reserve?

Mr. Ransom: Objected to.

The Master: Not allowed * * *. I will not allow it. I am not going to have this witness tell us what the Public Service Commission requires. I have their rules here.

Mr. O'Brien: *You have been letting him tell that a good many times. In fact, he has volunteered that information repeatedly*" (Rec., pp. 6867-9).

"The Master: Mr. O'Brien, before I let you ask another question, I want to know whether there is any item on Exhibit 355 that you are able to point to as being wrong, and in what respect it is wrong.

Mr. O'Brien: I decline to answer that question, your Honor.

The Master: Then I won't permit any other questions of this witness. Have you any other questions to ask, Mr. Chambers?

Mr. Chambers: Yes, I have a great many.

Mr. O'Brien: Your Honor, I want to say for the record, for your benefit, that while I appreciate you will make the same ruling with respect to this exhibit that you did with respect to Exhibit 205, and respecting your ruling and having taken my exception, having determined not to pursue that line of inquiry any further than to make the record, I want respectfully to except now to your suspending my cross examination of the witness. I except, with respect to this particular exhibit, for the reason that I propose now, if not barred by your Honor's ruling, *to determine by cross examination the manner in which these figures covering eight months have been prepared, an unusual period*

in rate cases and an unusual period in business concerns and in fiscal organizations for setting forth aggregate figures of profits and losses and expenses and receipts, to determine any proposition. I propose to find out just how the examination of the books was conducted; how far the witness depended upon the examination he made of the books as of 1918 in his conclusions as to the accuracy of the books for 1919 leading up to these figures. Furthermore, to bring out through the examination, the utter inadequacy of figures covering an unusual number of months, to show any particular facts in regard to——

The Master: Just a minute, Mr. O'Brien.

Mr. O'Brien: Let me finish the sentence. With regard to the net revenues of the company.

The Master: That finishes a sentence.

Mr. O'Brien: I further——

The Master: No.

Mr. O'Brien: The record will close with a dash, I suppose.

The Master: The stenographer can close it with a dash, a semi-colon, or a period, or anything he pleases. * * * The Master rules that he will not permit any further cross examination on Exhibit 355. He has permitted counsel to ask question after question of Mr. Teele for nearly twenty-five minutes, bringing out a point that he has explained in detail that he wanted to bring out so that he could make a record. I direct counsel to discontinue asking another question about Exhibit 355 unless he changes his mind and is able or willing to point out some item that requires cross examination, in the sense that his investigators have indicated a wrong basis of calculation, or a basis other or different than the 1918 calculation, or some useful point. * * *

Mr. O'Brien: There are some matters that need somewhat different treatment so far as the

examination of the witness is concerned, than was given to Exhibit 205. For illustration: we found when we went into the examination of the complainant's witness as to transferred gas for the year 1918, that having set up certain figures from month to month of the gas transferred account, they disregarded those figures at the end of the year, and there were some inquiries in addition to those that I have attempted to make this morning on transferred gas, that I would like to make with respect to that particular subject.

The Master: No, I won't allow it. * * *

Mr. O'Brien: The method that was used during the period 1919 for the determination of the debits and credits on the gas transferred account, covering the gas transferred transactions between the complainant and the affiliated companies; the extent to which the complainant's men undertook to examine the account of the several companies who sold gas to the complainant in 1919; how far they went with Astoria; what they found to be the practice of that company with regard to operating expenses in 1919; whether they were the same, and whether there were any different items of expense of substantial character during the year 1919 which were not included in the year 1918. To illustrate: what additions to capital invested were added to the account during 1919 of the Astoria Light, Heat & Power Company, and used as a basis for determining the interest on the investment during the eight months; the scope of the examination, while it might border on things that were already brought out, would necessarily be different, because they have taken here an unusual period. I may say in this connection, your Honor, that a situation like this arose in the case recently tried before Justice Greenbaum, and he was inclined to disregard a showing of a certain number of months.

The Master: Well, so may I.

Mr. O'Brien: So that is important to us. * * * I would like to bring out through the examination of this witness, the characteristics of a showing made only on eight months, from any books of account, as being not adequate for the purpose of drawing conclusions as to the results for a whole year.

The Master: I do not need the witness's testimony on that. * * *

Mr. Chambers: I want to say * * * Mr. O'Brien was cross examining the witnesses for all the defendants and was taking our place as to these questions which he asked, and which were not touched upon by the other defendants and we take the same position that he does, and except to the refusal of the Master to allow him to put these questions to procure these answers. * * *

The Master: Well, we will settle this very quickly. *Is there any item in there you say is wrong, and if so, what?*

Mr. O'Brien: I decline to answer the question.

The Master: Then I will not permit any questions on Exhibit 368.

Mr. O'Brien: *There are a great many questions I want to ask as to the methods by which he has treated the accounts.*

The Master: *I will not permit it.*

Mr. O'Brien: *How far he has gone to test their reliability; how far he has gone to determine whether these items should be set up in the particular accounts in which they are set forth; how far he has depended upon figures, reports, documents and papers that are not in evidence, and how far he has depended on statements made to him by the engineers and employees of the Company; and I intend to conduct, with respect to this exhibit, the inquiry that I have with regard to other matters, where I went along without your Honor's ruling,*

which you made at the close of the session yesterday.

The Master: I have ruled on this exhibit. Is there any other exhibit you want to ask about?

Mr. O'Brien: I take exception to your Honor's ruling.

The Master: I am going to take the next exhibit" (Rec., pp. 6878-6884).

* * * * * * *

Q. Now, I ask you what effort you made to ascertain or check up the accuracy of the entry, 'Sundry Debtors, sale of condemned meters, $151' —what data did you use?

The Master: Mr. Chambers, that is precisely the kind of question I told you I didn't want you to ask.

Mr. Chambers: That is not like the other.

The Master: Yes, it is.

Mr. Chambers: I am going to ask one of each variety.

The Master: Objection sustained. I told you yesterday, also, that I did not want any questions asked, asking this witness what he did, when he has told us a dozen times what he did.

Mr. Chambers: If the Court please, I understand that you are not going to allow us to ask much of anything, or to cross examine, or to protect our rights, *but I have got to get enough on the record to indicate our position and the attitude of the Court*, and I am going to do it. I just want to show the atmosphere.

The Master: If you don't obey my instructions, I will order you to sit down.

Mr. Chambers: You can do that; I will be glad to have you order me to sit down now, and I will take an exception.

The Master: When the time comes that I think you have defied the Master's ruling long enough, I will order you to sit down.

Mr. Chambers: Any time you want me to sit down, I will sit down.

The Master: I know you will.

Mr. Chambers: But I have got to protect my rights and put certain questions.

The Master: Come along now" (Rec., pp. 6394-8).

"Q. Now, I see one item of insurance appears to be here; insurance of George B. Cortelyou, *et al.*, Liability Insurance Trustee on Automobile. What did you find out about that? Any names in addition to Cortelyou's shown here?

The Master: Let me ask, Mr. Chambers, have you anything in mind particularly about that item?

Mr. Chambers: Well, I think it is——

The Master: Ask the point directly, will you? * * * Don't ask him what he did. What is your point?

Mr. Chambers: I want to find out what he found out about that expenditure in addition to what is shown here, and what it is for.

The Master: I won't allow it.

Mr. Chambers: Exception.

The Master: If you have any point that you want to bring out, if you want to direct the witness's attention to it and you want to get it on the record, bring it out, ask your questions.

Mr. Chambers: I have a thousand points here that have to be developed by questions.

The Master: Most of them are so dull that they are useless.

Mr. Chambers: I take an exception.

The Master: Get a point that is of some use to us. If you have a point about this item, put it, and get it.

Mr. Chambers: I want to find out what he found out.

The Master: Oh, I don't care. I want to know what your claim is, and if you have any claim to make with reference to it, what you want to bring out on cross, bring it out. Don't

let us waste an hour on it. I don't understand this kind of cross examination.

Mr. Chambers: I know, I see you don't. I take an exception to your Honor's ruling——

The Master (interrupting): It is a new one on me.

Mr. Chambers (continuing): Or whatever you call it.

Q. Now, what information did you obtain about that expenditure, if any, in addition to what is shown on page 1043 of this exhibit?

The Master: Objection sustained, upon the ground that this witness has testified many times that his information came from various sources, and that in the multitude of items appearing in these books, it will be impossible for him to state definitely what any particular item was for without referring to the voucher and that this kind of cross examination is not at all useful as cross examination.

Mr. Chambers: Exception.

Q. Then I find an expenditure of $2,765.68 to H. E. Gawtry for fire insurance.

Mr. Ransom: H. E. Gawtry, *et al.*, Trustee. Why don't you read it all?

Q. That was insurance trustee.

The Master: Same ruling. The Master repeats the statement, that if counsel has any point in his mind that he wants to make clear, I will let him ask the question that brings out the point. These questions that are asked, to my mind, are useless.

Mr. Chambers: That is what I am endeavoring to do; I except to the refusal of the Master to allow me to ask the question. I haven't even asked it.

• • • • • • •

Q. Now, this item of $48,722 which you set up here for vacation and sickness in your Exhibit 205, which is found on page 1047 of this operating ledger; did you examine or obtain any information as to what that expenditure was for, outside of what is shown in the operating ledger *and the vouchers*, to ascertain if it was a proper charge for cost of production and distribution?

The Master: Haven't I made myself clear to you, Mr. Chambers, that I don't want this witness's judgment as to whether an item is or is not a proper charge to production and distribution?

Mr. Chambers: I did not ask him that. I asked him what information he used upon which he based his inclusion of it in the cost of production and distribution of gas.

The Master: Objection sustained.

Mr. Chambers: Exception" (Rec., pp. 6398-6401).

"Q. How did you figure out the amount of gas under the title 'Municipal Lighting'?

The Master: Mr. O'Brien, before I rule on that, I ask you this: Schedule 1 of Exhibit 205, prepared by this witness, sets forth the amount in cubic feet and in dollars of sales of gas during the year 1918 at 80 cents. Likewise, municipal lighting, public buildings and street lamps, and also prepaid gas at the various branches. It it your contention that this witness's statement that the books show these figures, is not correct, and if so, in what particular?

Mr. O'Brien: I am making no contention at this time. I am cross examining the witness within my rights.

The Master: Objection sustained.

Mr. O'Brien: I am cross-examining this witness to find out where he got these figures from and what steps he took to determine their reliability.

The Master: Objection sustained.

The Master rules that in view of the opportunity afforded counsel for the defendants to examine the books and records and these tabulations, that the Master will not permit cross examination *except as to items which counsel claims are incorrect and point out the errors or claim of inaccuracy.*

Mr. O'Brien: Then, your Honor takes the position that it is necessary in a rate case for the defendants to go into an examination of the books before they cross examine a witness and be prepared to come in and say where they differ with the witness?

The Master: You have heard my ruling.

Mr. O'Brien: I certainly take an exception to that ruling * * *. I urge upon your Honor the error in which you fail by making that ruling.

The Master: *You will not suffer from the ruling.*

Mr. Chambers: Yes, we will suffer, if it is erroneous.

The Master: *How will you suffer if it is erroneous? If it is erroneous, you reverse my judgment.*

Mr. Chambers: *That is very expensive, to reverse the party who makes the error. It falls on the litigants and not on the Court.*

Mr. O'Brien: *This is the same question that your Honor raises now that came up with respect to your ruling as to Exhibit 366, in which you directed us to proceed to meet the employees of Mr. Teele, an accountant employed by the complainant company and go over with them computations that they have made, to find out whether or not these books are correct* * * *" (Rec., pp. 6619-20).

"The Master: I am not going to allow you to go into a cross examination and ask him a lot of questions unless you tell me what your point is" (Rec., pp. 6629-30).

"The Master: The books speak for themselves. You don't have to ask a witness whether a book shows something when the book will show for itself" (Rec., p. 6647).

"Q. Where did you get your residual expense from?

The Master: Before I permit this witness to answer, I am going to ask what the point of the question is.

Mr. O'Brien: I am going to find out how far he went back to the statistical record.

The Master: Then the objection will be sustained, if that is the purpose of it" (Rec., p. 6654).

"The Master: * * * The witness has stated in answer to an inquiry, 'Yes, I did run across revenues from sources other than the gas-making business. I did not include them in the schedule, because I was employed to prepare a schedule showing the results of the gas-making business, the receipts from the gas-making business. I have excluded everything else.' Now, what he excluded is none of my business; I don't care. If your experts say there is an item that he should have included, call his attention to it and ask him whether he included the particular item, and if not, why not" (Rec., pp. 6739-40).

No proof of the amount of oil used in its daily manufacture of gas was offered by complainant, unless we dignify as proof the hypothetical testimony given by complainant's engineer of manufacture, George E. Woods.

In the hypothetical plant set up by Mr. Woods, he testified that 4.1 gallons of oil would be used in the manufacture of one thousand cubic feet of gas. This is the kind of testimony upon which complainant relies to support its decree. Complainant gave no testimony by any

living witness to show *how much oil it actually used.* The quantity of oil actually used by complainant in its daily production of gas is not a matter of scientific or expert opinion. It is susceptible of direct proof by the men in complainant's employ who are engaged in the work of making gas. It seems too elementary for repetition that when facts are susceptible of proof by witnesses who can testify to them of actual knowledge, expert opinion may not be substituted for facts. And yet the Master based his findings of complainant's cost of making gas upon Mr. Woods' formulas. He went even further and insisted that, as a prelude to permission to cross-examine Teele, counsel for the defendant Swann *state how much oil complainant used.*

The Master seemed to be satisfied that the cross-examination would be sufficient if it disclosed the discovery by Mr. Sangster (an accountant employed by defendants) *of clerical errors in the reported amount of oil used.*

Counsel for the defendant Swann properly objected to the Master's procedure upon the ground that the effect of it was to shift the burden of proof from complainant to defendants.

The men who weighed the coal and measured the oil were not produced. They should have been called by complainant and examined, not as to every pound of coal and every gallon of oil, but at least to the extent of showing that the books accurately record the amount of coal and oil used. The defendants insisted that the men who weighed the coal and measured the oil should have been called and examined for a period, say, of one or two months, so that if the books were shown to be correct as to these items for that period, the court would have some evidence upon which to base a finding that the books are *prima facie* proof of their contents for the entire period

they cover. As a sample of the "proof" by which the Master permitted complainant to establish its case, he received in evidence its Exhibit 338 which is a produce exchange inspector's report purporting to contain a statement of gas oil delivered. Neither the inspector nor anybody else was called to prove that the report is accurate (Rec., p. 4005).

Having ruled—erroneously, as we have elsewhere contended — (Point IV) that complainant was not to be put to the necessity of proving these items by the testimony of those having personal knowledge of the facts, it is submitted that the least the defendants should have had was the widest latitude in cross-examining Teele for the purpose of ascertaining whether or not he had made the specific tests directed by the Master.

> "The Master: Let us take 21st Street. We have an item at 21st Street of * * * 1,816,439.87. * * * You question the accuracy of that item do you?
>
> * * * * * * *
>
> Mr. O'Brien: It is partly to question the accuracy and it is partly to find his method.
>
> * * * * * * *
>
> Mr. O'Brien: I question the accuracy of it.
>
> * * * * * * *
>
> Mr. O'Brien: I intend to ask the witness and present to this witness now, vouchers for the invoices of oil delivered during the year 1918 at East 21st Street, with a view of finding out whether he has followed the invoices and the measurements shown on the invoices, or records made by other men. * * *
>
> The Master: I don't care anything about that.
>
> Mr. O'Brien: And that they have followed the invoices in each instance, instead of the measurements made by their own men, as shown on the back of each one of the invoices.

The Master: I don't care anything about that. I want to know how much oil *you say they used.*

Mr. O'Brien: I am not going into that now, your Honor.

The Master: Then the objection is sustained.

* * * * * * *

Mr. O'Brien: I insist, your Honor, with due deference to your view of the matter, that I am entitled to cross examine this witness (Teele) as to the details of the Schedule 9 showing expenses of cost of gas production, without interference from your Honor under a rule which you have just made, that cross examination of this witness is to be limited by you to those matters only which I am prepared to say are errors in said schedule, and I assert that I have a right, and am properly within my rights, representing the defendants, to ask the witness as to the methods by which he made the tests that he said he made under your Honor's direction during the course of this trial, at the 99th Street station, upon which tests he has predicated his conclusion that all of the records with respect to the matters therein tested were infallible and correct. I insist that I have the right to proceed to cross examine the witness as to all of the details of this particular schedule, where these items came from, and if he says in the ledger, that they are taken bodily from the ledger, how they got into the ledger, from what accounts; how far he went in his investigation of the correctness of these accounts; whether or not the records in which he sought verification of the several items set forth in the schedule and in the ledger were found in papers that are not in evidence in this case—in other words, that are extraneous to the case.

I insist that the Master has not the right to mould the questions and mould the cross ex-

amination, to take the cross examination of a witness into his own hands and proceed to bring out the matters which I desire to bring out in my own way. As to the particular matter, the specific matters before me at this moment, to wit, the question of the deliveries of oil at the 21st Street station, where upon their face there is a discrepancy with respect to practically every one of the invoices, between the measurements made by some employee at the works and the measurements made by the Standard Oil Company of New York and Charles Martin & Co., employed to measure that oil, I have a right to cross examine the witness as to whether he took the invoice prices and why he discarded the records that are made by the employees of the Company, in the face of the fact that the measurements of oil used are made by these employees and finally recorded in the manufacturing books. * * *

I respectfully submit, further, your Honor, in regard to the proper scope of a cross examination in a case of this kind, that we are entitled to examine the witness as to the manner in which he made up his various schedules, with a view to outlining our own examination of these papers if we see fit to make such an examination, with a view not only to facilitating our own work, but with a view to expediting the trial if it reaches that point where the defendants put in any evidence.

The Master: Mr. O'Brien, I have heard all I care to listen to. I am firm in my resolution that I will not permit cross examination upon any subject, in any manner, unless you can show me where it is wrong and where cross examination will be useful. * * *

Mr. O'Brien: There are other branches of the examination I want to take up.

The Master: Well, you better take them up.

Mr. O'Brien: And which will very likely infringe on the ruling you have just made.

The Master: Then I will sustain objections to them.

Mr. O'Brien: Do I understand that I must stand and deliver to the Master my reason, and my evidence of errors, before I will be permitted to cross examine the witness as to the methods he has adopted?

The Master: I don't want your evidence of errors; I want your claim; I want your contention; I want what you say is the fact. You have had Exhibit 205 for months, and if you cannot tell me now in what respect you claim this item of 1,816,439.87 is wrong, and how much you say it ought to be, I will not let you ask a question.

Mr. O'Brien: Your Honor, I call your attention to these invoices, all of those show errors; I call your attention to the statement of the witness that he followed the invoices; I call your attention to the fact that when I asked him as to how he got his measurements of oil, how the records of all this got into the manufacturing book at the stations, the witness was not able to answer; I call your attention to the fact that at various times during the examination today and since he has been on the stand, he has failed to give answers until his assistants brought him up information either written or oral.

Now, in regard to the questions that we have before us, I say with all deference to you as the referee in this case, that your Honor has no right to say that before we can examine a witness we must say 'Here is an error and I want to ask the witness about it.' Your Honor has said that you want a general statement. Our claims are set forth in our answer to the complaint in this case.

The Master: That is not enough for me.

Mr. O'Brien: Our claims with respect to the measurement of oil are that they are not kept reliably. Our claims with respect to the records

of oil delivered are that they are manifestly erroneous. Our claims with respect to coal delivered are practically the same. I have a right to bring out from this witness in regard, say, as to boiler house fuel, and as to generator fuel, the fact that the labor of handling that material to put it in the coal pile, is charged up to a specific account in the operating ledger; that the labor involved in handling material and producing gas in the generator house, is taken care of in a column or in an account specifically set forth in the gas production account; whereas, as to the handling of coal from the coal pile into the generator house, it has seemingly not the dignity or importance to be recorded similarly in the operating ledger. * * *

The effect of your ruling is to put the burden on the defendants in this case. * * *

Mr. O'Brien: Your Honor seems to assume that the defendants' case is being tried here. We are on cross examination of the witness. There has been no proof adduced here yet, except the general books of account, and these exhibits as to expenditures made by the company, except, perhaps, as to the testimony of Mr. Addicks (as to contracts for oil purchases) and Mr. Gawtry, as to the manner in which coal contracts are made. * * *

The Master: I am going to ask you to go on to half-past four, Mr. O'Brien.

Mr. O'Brien: Right away I am met by your ruling. I cannot tell how far you intend to extend that rule.

The Master: I am going to hold you right down to it.

Mr. O'Brien: You tell me to go ahead and at the same time you are saying I cannot go ahead.

The Master: Do you raise any issue with reference to the first item on here, labor, superintendents?

Mr. O'Brien: I have got to find out where he got it, and what items are in it.

The Master: What do you say about it?

Mr. O'Brien: I am not going to state at this time what issues I raise with regard to any item here.

The Master: Then you will have to pass on to some other subject matter that maybe I will allow you to ask about.

Mr. O'Brien: Was your Honor's ruling confined here to this particular schedule?

The Master: The general principle applies to every schedule now. * * * *If Mr. Saugster has told you that as he figures it, the amount of oil used was 1,616,000 instead of 1,816,000, and that was due to an error in computation of 200,000 somewhere, I will let you point it out after proper cross examination*" (Rec., pp. 6787-6796).

"Q. Mr. Teele, did you examine the coal contracts or did your men, in connection with the tabulations made on Exhibit 205, as to coal delivered and used?

The Master: One moment. What is the purpose of the question?

Mr. O'Brien: The purpose of this examination, your Honor, is to find out how far the examination of the witness went, or his employees, into the question of verifying the figures he found on the books as to coal used in gas production by the complainant company in the year 1919; to find out what tests he made at the 99th Street station, where he said he made the tests on these matters, pursuant to your Honor's direction; how far those tests went; whether they included all of the records and original statements as to coal deliveries that are made at the stations where coal is received, and particularly at this station where he said he made the tests.

The Master: I will not allow the question.

> Mr. O'Brien: The method adopted by his men in making that examination; the extent to which they depended upon oral explanations made by some officers of the company, or the extent to which they accepted statements made by officers or engineers or other employees as to the method of weighing and measuring the coal delivered; the methods of making tabulations and the extent to which extraneous records were relied upon by the witness in verification of the accounts that he found on the books covering the use of coal; the extent to which he depended upon the manufacturing book * * * how far he verified the manufacturing reports with the actual returns made from the boiler house and generator house as to coal used.
>
> The Master: I won't allow the question, Mr. O'Brien, unless you can point out to me, as you did as to the oil situation, some particular point as to which inquiry may be useful" (Rec., pp. 6814-15).

But the Master did not permit the inquiry "as to the oil situation" (Rec., pp. 6796-6812).

After defendant's counsel had vainly attempted to have Teele explain why some of his figures do not agree with those reported by complainant to the Public Service Commission and to state whether he made up the item, "Interest on Bank Balances" in the form in which it appears in his tabulations or had subjected them to any adjustments, the Master directed Teele to leave the stand and declared his cross-examination finished.

> "The Master: And, with respect to Exhibit 366, I won't let you ask any more questions unless I can see the usefulness of them and except for 366 I won't let you ask another question.
>
> Mr. O'Brien: Well, I note an exception to your Honor's ruling.

The Master: I don't think I will let you ask any questions about 366, either. I think Mr. Chambers has fully covered 366.

Mr. Chambers: Your Honor, I say I have not.

The Master: Well, I think you have.

Mr. Chambers: I did not cover "Sales of Gas," "Interest on Bank Balances," and——

The Master: Well, now, will you let me find out about this. Mr. O'Brien, do you want to ask about sales of gas?

Mr. O'Brien: I do.

The Master: What point do you want to develop?

Mr. O'Brien: I want to find out why his figures do not agree with those that are reported in the Public Service Commission, whether he examined them.

The Master: All right, ask him.

* * * * * * *

Q. Mr. Teele, did you, for the years covered by Exhibit 366 make any comparisons for verification or other aid or help between the figures your men collated and the figures made in the reports annually to the Public Service Comission?

The Master: That question will not be allowed. I will permit counsel to bring out from the witness the fact that his figure for any year does not agree with the figure in the reports of the Public Service Commission and to explain why there is that variance.

Mr. O'Brien: Of course, if your Honor says that the witness answers that he did not consult them at all, then the questions need not be answered.

The Master: Next question. I will ask it myself in a minute, if you do not * * * Now, what other item is there that you said you wanted to ask the witness about? Interest on bank balances?

Q. From what did you take your item for which you, on Exhibit 366, entitled "Interest on Bank Balances, etc.," from a particular account in the books or was it——

The Master: Objection sustained. * * * what do you want to develop?

Mr. O'Brien: I want to find out where he got it, and whether there were any adjustments.

The Master: I don't care for what you want to find out, but what you expect to show?

Mr. O'Brien: I expect to bring out on the record how he got the amount; whether he went into the books or——

The Master: Did you take the matter up with him as Mr. Chambers or Major Clark did?

Mr. O'Brien: I did not.

The Master: Objection sustained. * * * Unless you have in mind a particular matter that you want to develop by a particular question, the question will not be allowed.

Mr. O'Brien: Your Honor will recall that when I went into bank balances I found he had made an error and had not included them all.

* * * * * * *

Q. Was this item, "Interest on Bank Balances, etc.," were the figures in this item taken directly from the books in the form in which they are here, and in the amounts, or were they subjected to any adjustments by you?

The Master: The same ruling. The Master repeats what he said before, that unless counsel can show what he expects to show by that question, the question will not be allowed. If counsel has no point about any questions that he has in mind, he better not ask them. * * * Now, Mr. Chambers, have you any questions to ask, and if so, I am going to let you take up the recross again, pointing out any variances, inferences, failure to include or the exclusion of items as to interest on bank balances, rental of jointly used facilities, miscellaneous rent revenue and

revenue from street lamp maintenance if you have any.

Mr. Chambers: Yes, I want to cross-examine him about those different items.

The Master: Have you any memorandum of variances that you want to point out, such as you pointed out as to other items?

Mr. Chambers: I have a memorandum. I want to find out where he got his information as to bank balances.

The Master: That I will not let you ask, where he got his information. That is what I would not let Mr. O'Brien ask. Mr. Teele, leave the stand: the cross-examination is finished" (Rec., pp. 7578-7587).

Henry W. Brundage, chief of complainant's accounting department, was called by complainant and identified its books of account. Presumably, Mr. Brundage is at least familiar with the bases of the accounts in complainant's books. He has been in complainant's employ since March, 1903, and testified that its books have been and are kept under his direct supervision (Rec., p. 1395). His cross-examination discloses what appears to be an amazing degree of ignorance concerning numerous items. Defendants were entitled to develop whether this lack of knowledge was real or feigned, and were also entitled to obtain the fullest information in his possession concerning said accounts, particularly as these books are practically complainant's sole reliance in support of the decree rendered in its favor. The Master, however, had his own views concerning the necessity for cross-examination of this vitally important witness His notion was that any entry in the books which did not upon its face tell its own story could be made plain by an analysis of the books out of court. That may be true, but with Brundage on the stand, the defendants were entitled to have

his explanations under oath, so that they could be spread upon the record for the reviewing court's inspection.

"Q. On page 149 I find an entry "National City Bank, unclaimed dividend." What is that about?

Mr. Ransom: Objected to.

The Master: Sustained. Analysis of the books will explain those items.

Q. And where did you get your supporting data for then?

Mr. Ransom: I object to that question.

The Master: Same objection, ruling and exception.

Q. On page 148 there is an account of cash. What is that?

The Master: Same ruling by the Master and I shall request Mr. Chambers not to repeat any more questions because my rulings will be the same. Any inquiry of this witness as to what certain accounts mean, I shall rule out on the ground the books themselves are the best evidence and must be analyzed to get the meaning and find out what they are" (Rec., pp. 2955-6).

"Q. Now, loans. I see you carry an account here for a good many loans made to your allied companies and other people.

* * * * * * *

The Master: Objection sustained. I think the point that some time is used for appliances and for loans and discounts and matters of that kind, is sufficiently spread on the record.

Q. Now, interest. You carry an item for interest.

The Master: I assume that that question has relation to the same point and I will make the same ruling.

* * * * * * *

Mr. Chambers: I don't know what this entry here is.

Q. Does this entry here on page 611 relate to interest?

The Master: Mr. Chambers, haven't you and your experts availed yourselves of the time since these books were put in to familiarize yourselves with the books? That was the purpose of postponing this cross examination.

Mr. Chambers: They are working on it, all of them.

The Master: I sustain the objection.

Mr. Chambers: Exception" (Rec., pp. 5724-5).

"Q. Does the payroll for Utilization Department come into the Accountancy Department in the same way in which other payrolls do?

The Master: * * * I will sustain the objection. I stand by my ruling. I think the cross examination has gone far enough, especially in view of the opportunity offered the defendants and their experts to make an exhaustive investigation of the vouchers, records and documents of the gas company" (Rec., pp. 6054-5).

Q. I ask the witness whether there are any payments made under 'Promotion expense, Utilization Department,' on executive order?

The Master: Objection sustained.

Mr. O'Brien: Exception.

Q. I ask the witness whether any of the payments that are reflected in this account 'Promotion expenses, Utilization Departmtnt,' were made on O. K. from the Secretary's office?

The Master: Same ruling.

Mr. O'Brien: Exception" (Rec., p. 6057).

"Q. I call your attention now, to 'miscellaneous general expense account,' page 877 of the operat-

ing ledger B for 1919, and ask you what the references are under the cross-reference column? A. Voucher numbers.

Q. Invariably?

The Master: Objection sustained.

Mr. O'Brien: Your Honor has not seen this page yet.

The Master: I don't care to see it.

Mr. O'Brien: There are various cross-references that need explanation.

The Master: You ask your experts if they haven't got the explanation.

Mr. O'Brien: *I have a witness on the stand, your Honor.*

The Master: Objection sustained.

* * * * * * *

I am assuming that if there is anything wrong about these books that your experts would have discovered it so you could point it out.

* * * * * * *

Q. Mr. Brundage, will you tell me what E N G means under the cross-reference column?

The Master: I sustain the objection. I am going to assume that the experts employed by counsel for the defendants know what it means.

Mr. O'Brien: Exception" (Rec., pp. 6058-9).

No evidence was offered by complainant to show that the salaries paid to its general officers or the expenditures incurred by its purchasing department, were fair and reasonable.

Mr. Gawtry is one of complainant's vice-presidents and in charge of its purchasing department. Although no objection was made by complainant's counsel, until after the Master had interposed, the Master would not

permit counsel for the defendant Swann to ask Gawtry the following pertinent questions:

> "Q. Has your purchasing staff increased or diminished during the last year?
>
> Q. How many were in the purchasing department in 1913?
>
> Q. In 1914, 1915, 1916 and 1917?
>
> Q. Do you know of any other gas company in the country that pays a man $15,000 for your work?
>
> Q. Who fixes your salary, Mr. Gawtry?
>
> Q. Is it fixed by executive order?
>
> Q. Will you state what Mr. Macklin's salary is?
>
> Q. Now, can you state with any reasonable certainty or definiteness about the quantity (of steel pipe) you are carrying now, as compared with other years, say 1916 or 1917" (Rec., p. 3700).

Walter Addicks is one of complainant's vice-presidents and negotiates its purchases of oil and the sale of its residuals, excluding coke. On direct examination, Mr. Addicks testified that he has been connected with the Consolidated Gas Company since 1903 (Rec., p. 3774), has constructed buildings, erected apparatus, laid distributing facilities for gas companies and purchased materials and employed labor in the construction and operation of gas plants (Rec., p. 3777). On direct examination, Mr. Addicks also testified:

> "Having become originally, and being made vice-president, in the absence of the president I became acting president of the company for a number of years. All during the period I have been connected with the company, I have attended meetings of the executive committee, acting as secretary for that committee, and from time to

time I have had special departments under my control. At one time I had charge of the industrial appliance department, which was later merged into the commercial department. * * * Latterly, I have had particular charge of the building of the garage of the company. * * * I am a member of the board of trustees as well" (Rec., p. 3779).

On cross examination of Mr. Addicks, the following occurred:

"Q. Now, administrative and general expenses, which I have asked you about. Do you know whether that is credited in these schedules of Mr. Teele's?

The Master: I won't allow it. Mr. Teele is the man to ask about that.

Q. Do you know whether or not that item of administrative and general expenses of $36,728.50 is included in Mr. Teele's schedules, do you?

Mr. Ransom: I object to the question.

The Master: Objection sustained.

Mr. Chambers: I am asking if he knows.

The Master: I won't permit the question. I won't permit him to say what is in Mr. Teele's statement. Mr. Teele can testify to that.

Q. Well, do you know if it is in the items set out in the company's ledger of salaries for 1918?

Mr. Ransom: I object to the question as immaterial, irrelevant and incompetent.

The Master: I will sustain the objection, not on that ground, but on the ground that these things can be brought out better from Mr. Teele.

Mr. Chambers: Well, if your Honor please, we will never know.

The Master: I will.

Mr. Chambers (continuing): Just exactly who is the person to enlighten us most on these subjects?

The Master: When Mr. Teele comes on, if by any possibility I see you ought to get somebody else, you call me for it.

Mr. Chambers: Where you fall into error on this, Mr. Teele doesn't know anything about the company's business any more than you or I do.

The Master: Mr. Teele has attempted to make up a schedule which he attempts to say he knows is a summary of the books, from which I assume he knows what the books contain.

Mr. Chambers: Well, he hasn't any more knowledge than the Master has as to what the company did or did not do.

The Master: I am going to find out how valuable his tabulation is, by the time you men get through.

Mr. O'Brien: * * * This tabulation is presumably made up from the same sources that Mr. Teele made his figures, except as to certain items in the Teele schedule which he made up from papers and records extraneous to the general books of account.

The Master: No.

Mr. O'Brien: Now, the witness has testified that he knows that these figures are drawn from the journal, drawn from the ledger, drawn from the sundry creditors' books at pages blank, blank and blank and so on, and he ought to be able to determine whether or not they were in those books and whether or not Mr. Teele has extracted them from the books correctly.

The Master: Objection sustained.

Mr. O'Brien: Exception" (Rec., pp. 4385-6).

The defendants should not have been compelled to reserve any of the foregoing questions for Mr. Teele. Mr. Teele's mere recital of book figures could have been given by anyone able to read. The defendants had one of the most important of complainant's department heads

on the witness stand, and they were at least entitled to have him say whether or not he could give the desired information.

In the instant case, one of the most sharply contested issues is the reasonableness of the prices paid by complainant for oil. Defendants maintain that there is no valid reason for complainant's claim that it is compelled to rely upon the Standard Oil Company of New Jersey to supply it with the quantities of oil it needs. When Mr. Addicks was under cross examination, counsel for the defendant Swann endeavored to have him explain why the company was willing to pay the Standard Oil Company of New Jersey the prices it charged rather than provide larger tank capacity. Increased tank capacity would enable the company to store larger quantities of oil at times when the market for that commodity is relatively lower. Although complainant's counsel complained that the Master had misconstrued Mr. Addicks' testimony and made no objection to the cross examination, the Master experienced one of his frequent attacks of fatigue and dismissed the matter with his oft-repeated statement, "I have had enough of it" (Rec., pp. 4201-4).

> "Q. Well, then, as a matter of fact, when you say you must have a guarantee of the future, and you won't build tank storage equipment of proper capacity for reasons best known to yourself, aren't you shifting over that burden as to that responsibility for the future to the oil companies that sell you the oil?
>
> The Master: Of course he is.
>
> Mr. O'Brien: And they are making you pay for it, aren't they?
>
> The Master: Of course they are.
>
> Mr. O'Brien: Well, is that your answer, too, Mr. Addicks?

The Master: Don't let us have any more of that argument.

Mr. O'Brien: Just a minute, your Honor.

The Master: No, I am tired of it. Of course they are. Mr. Addicks has told you several times that they have balanced the situation as against putting up big tanks to store oil and gamble on the market in that way, and gamble on the danger from lightning and other things, as against the requirement being placed upon the oil company of taking these risks and of providing the storage, and they figure that even though it does cost them a shade more to get it the other way, they are better off. What is the use of wasting time on that matter?

Mr. O'Brien: That is all right for you to dismiss the matter by calling it a shade more, but that is not in the evidence.

The Master: Well, cost them a lot more, I don't care about it.

Mr. Ransom: It costs them less.

The Master: The point I am getting at is this: you can't get any more from a witness than when he has told you the way his mind operates. This witness has, in fact, told you that they considered it, and they did not believe it is good judgment, they do not believe it is good business judgment, and they would rather pay more to the Standard Oil Company for the oil stored by them and delivered as they need it, than to build these tanks themselves. They think it is better business.

Mr. O'Brien: That is a general proposition, but I want to find out on cross examination the premises on which that judgment is based.

The Master: I won't allow any more questions. It is pure judgment and pure argumentative questioning when you follow it out.

Mr. Ransom: I do not think your Honor has stated what the witness has said. He has not said they are willing to pay more.

The Master: I will assume it.

Mr. Ransom: He does not say it.

The Master: Suppose he does not?

Mr. Ransom: Well, it would not be true.

The Master: That don't make any difference.

Mr. Ransom: I don't want your Honor to take a false premise.

Mr. O'Brien: Your Honor, Judge Ransom and the witness and you and I are all in disagreement now.

The Master: I won't hear any more on this line.

Q. I will ask the witness whether the last two answers are his answers.

The Master: You need not answer that. I say the subject is fully covered. I have stated to the extent the witness testified to be a fact. I may be wrong about it. If I am wrong, I am wrong.

Mr. O'Brien: I respectfully submit, your Honor, that as to that conclusion we ought to find out whether it is based on logical premises.

The Master: I say we have had enough of it" (Rec., pp. 4201-4).

It is difficult to perceive why the Master did not permit Mr. Addicks to answer the following question. It had an important bearing upon the question of the reliability of the candle-power tests of complainant's gas made by the City's inspectors.

"Q. Have you ever, or has complainant company ever made any written protest or objections to the tests made by The City of New York of the complainant's gas during the year 1918 as being inaccurate or unreliable?

Mr. Ransom: Objected to as incompetent and immaterial.

The Master: Objection sustained" (Rec., p. 4453).

Robert A. Carter is another of complainant's vice-presidents and its secretary. He has been connected with the company since 1884. On his direct examination, he testified:

> "I have charge of the company's general books, all of the books of account, of the stock transfer department, of the various minutes of the company, and I have in my jurisdiction more particularly under my supervision, the commercial department, the appliance department, and the utilization department" (Rec., p. 8330).

We venture to say that there is scarcely a detail of complainant's history and business with which Mr. Carter is not familiar. He was a witness in the prior suit, and before the Stevens Committee of the New York Legislature which conducted the investigation that culminated in the enactment of the 80-cent statute. In the instant case, Mr. Carter was called by complainant to testify to a great variety of subjects, and on some occasions, at least, apparently for the purpose of filling in gaps in the testimony of Teele and Woods. Mr. Carter testified, for instance, to commercial expenses, promotion expenses, the expenses and revenues of complainant's utilization and gas appliance departments, and to the item of transferred gas.

On every one of the subjects just enumerated, the Master shut off the cross examination of defendants' counsel in his usual peremptory and unjustifiable fashion (Rec., pp. 8562-3; 8594-6; 8611-13; 8669).

Complainant offered no evidence on the question of how much time complainant's officers devoted to its business of making and distributing gas as compared with the time they spent on complainant's other activities and on the affairs of other companies. While under cross examination by counsel for the defendant Swann, the

Master would not permit Mr. Carter to go into these details (Rec., p. 8594).

The Master's direction "to get from the books" how much was actually paid by complainant to the Standard Gas Light Company for repairs to gas appliances (p. 8611), was entirely improper. Mr. Carter testified about this subject on direct examination in such detail as to induce belief that he was familiar with every branch of it. The defendants were entitled to the fullest information about this item from the department head who professed such familiarity with it. At the very least, they were entitled to test the sources of the information from which he said he obtained his figures.

The Master's refusal to permit counsel for the defendant Swann to ask Mr. Carter whether the National Coal & Coke Company had paid any dividends "within the last two years" was erroneous (Rec., p. 8719).

The National Coal & Coke Company was organized by complainant in 1901, ostensibly for the purpose of broadening and extending complainant's market for the sale of its coke. It was perfectly proper for the defendants to question Mr. Carter about the use of the National Coal & Coke Company by complainant, particularly as Mr. Carter had testified on direct to payments by complainant to said company. No good reason is apparent for the Master's attitude as it is revealed by the following:

Moreover, the land used by the National Coal & Coke Company is included in the rate base.

> "Q. Has there been at any time that you know of, since 1906, an active investigation made by an engineer or other employee or officer of the National Coal & Coke Co., or of the Consolidated Gas Co., to extend the business or see how it might extend the use industrially for domestic purposes of coke in the City of New York?
>
> * * * * * * *

A. At the times when there has been plenty of coke to sell, there has been, of course, no reasonable effort neglected to find a market for coke by canvassing and advertising.

Q. Are you able to say in concrete terms what that reasonable effort was, in the shape of money expended, employees sent out in canvassing and advertising?

The Master: The Master rules that the cross examination on this point has gone over the ground sufficiently. Question not allowed.

Mr. O'Brien: Your Honor, on that point, I think the subject ought to be exhaustive. The purpose of the question is obvious and I want something more than a general statement from the man that is running the business of that company.

The Master: I won't take anything more on that subject. Next question.

Mr. O'Brien: Exception. I propose to ask a number of those questions at this time to bring out the lack of activity in the development of the business of the National Coal and Coke Co., all of whose stock is owned by the complainant company; the disinterestedness of all the men that are charged with the running of that company; the failure to advertise the business and develop it and to cultivate among the people around the City of New York the use of coke for its many purposes; the utter lack of any work to find a market for it and the real purpose for which this selling company was organized and carried on by the complainant company.

The Master: What do you say was the real purpose?

Mr. O'Brien: Why, my idea of it is that it is simply used as another camouflage for carrying on the business, spending money and entering up charges on their books.

The Master: In other words, you say it is a useless appendix to the gas company?

Mr. O'Brien: I do say so.

The Master: That is what you want to bring out from this witness?

Mr. O'Brien: As it has been conducted——

The Master: My ruling stands.

Mr. O'Brien: Exception.

Q. Do you know how much is paid by the complainant company to the National Coal and Coke Co. annually for cartage, and for other work?

The Master: I will not take that, either.

Mr. O'Brien: But your Honor has taken this exhibit here that deals with a surplus.

The Master: That does not make any difference.

Mr. O'Brien: You have opened the door here to all those questions that go into the relations between the National Coal and Coke Co. and the complainant company. There are large amounts of money spent by the complainant company every month, payments made to the National Coal and Coke Co.

The Master: How do you know that?

Mr. O'Brien: I know that from some of the evidence in the case and from my own examination of some of the books.

The Master: The books are in evidence, are they not?

Mr. O'Brien: Not the books of this company.

The Master: No, the books of the gas company.

Mr. Ransom: And the cartage account was fully gone into.

Mr. O'Brien: What?

The Master: The books of the company show that, do they not?

Mr. O'Brien: They do not show it amply.

The Master: The question is not allowed.

Mr. O'Brien: We have before us now, your Honor, not the complainant's entries; we have before us a statement made which you have

received as evidence, that this is what their surplus is. My contention is, it has opened the door to an inquiry from this witness, who has some responsibility as a director of this company, the National Coal and Coke Co., into the way they run the business, what they spend the money for and the kind of work that they do.

The Master: The ruling stands.

Mr. O'Brien: I take an exception to your Honor's ruling. Then I will ask a few questions——

The Master: I will not let you ask any more questions. You are fully protected by the exceptions you have on the record.

Mr. O'Brien: I propose to ask the witness now as to his knowledge of the methods of the company in its relations with the complainant company, the amount of work and the way in which contracts are made as to cartage, the use of wagons, the trucking, the joint use of facilities and the other many details that enter into the relations between the two companies.

It serves the purpose of showing the way in which accounts of this company are enlarged, where money is wasted in the relations with this particular company, the way in which this particular company is occupying the properties of the complainant company, and so on. It reaches out in a dozen different directions and has a direct bearing on the operating expenses of the complainant company.

The Master: My ruling stands.

Mr. O'Brien: Exception.

Q. Do you know of any coke having been sold at any time by the National Coal and Coke Co. to the complainant?

The Master: The question comes squarely within the ruling just announced. It is not allowed.

Mr. O'Brien: Exception.

> The Master: We don't want any more about the National Coal and Coke Co. Get to something else" (Rec., pp. 8840-4).

The Master struck out as hearsay Mr. Carter's testimony in attempted justification of complainant's automobile expenses, and stated that without explanation, twenty-nine cars appeared to be an unusual number for the company to have. Defendants called Henry V. Middleworth, in charge of the company's garage department, for the purpose of having him explain, if he could, what appears to be an excessive expenditure for automobiles. When Middleworth took the stand, the Master immediately demanded:

> "What do you expect to prove by this witness, Mr. O'Brien?"

The following colloquy then ensued:

> "Mr. O'Brien: I expect to prove the methods used, the kind of records, the lack of supervision, and everything in connection with this that shows this is a needless expenditure.
>
> The Master: In other words, you expect to show by this witness, that it is not necessary for this company to have automobiles of any kind?
>
> Mr. O'Brien: You will draw that conclusion.
>
> The Master: No; I am going to find out what the purpose of this testimony is.
>
> Mr. O'Brien: Well, you cannot get me to apprise this witness of what I am going to ask him, your Honor. You are making rulings on this.
>
> The Master: All right, unless I can guess at what you are driving, and see it is useful to this case, I will have to adhere to my rulings, ruling out all your questions. This is not a legislative investigation, where they can roam all over the world. We have issues to try here.
>
> Mr. O'Brien: I have not taken this because it represents the only vulnerable spot in the methods

and ways and transactions of this company, but as illustrative of their way of doing business" (Rec., pp. 13135-6).

Under the circumstances, we submit it was highly improper for the Master to demand what counsel's object was and to follow that by the intimation that counsel expected to show by the witness that "it is not necessary for this company to have automobiles of any kind." The proper procedure was to allow counsel to put his questions and then exclude them if they did not appear to be competent, relevant or material. The Master's attitude at this stage of the case was characteristic of his treatment of defendants throughout the entire trial. Defendants' counsel were so frequently and so unfairly compelled to disclose the purpose of their questions in the presence of adverse if not hostile witnesses, that there cannot be any room for reasonable doubt that it had the effect of encouraging those witnesses to be evasive in their answers.

When counsel for the defendant Swann asked Middleworth the question,

> "I will ask you to take what you call the Chauffeur's Register for the first eight months of 1919 * * * and tell me if, in any case, these daily records have your O. K. or signature or check?"

the following occurred:

> "The Master: *If I hear an objection, I will sustain it.*
>
> Mr. Ransom: Objected to as incompetent and immaterial.
>
> The Master: Hearing an objection, the objection is sustained.
>
> Mr. O'Brien: Exception" (Rec., p. 13140).

Upon Mr. O'Brien's offer in evidence of the papers described by the witness as "Chauffeur's Registers" from January 1, 1919, to August 31, 1919, the Master not only refused to admit them but would not even permit them to be marked for identification (Rec., p. 13140).

When George E. Woods, complainant's engineer of gas manufacture, was under cross examination, the Master would not permit counsel for the defendant Swann to ask him whether or not there were any reasons other than Woods had offered at a previous hearing, why the Astoria plant was not run at higher capacity (pp. 8053-4).

Nor would the Master permit Woods to be cross examined on the subject of whether or not he had preserved the lists of men for each of the groups and years shown on Complainant's Exhibit 351, which was a table prepared by Woods purporting to show the wages paid by the Consolidated Gas Company. The Master gave as the reason for not permitting the question, that defendants' accountant could analyze the exhibit as well as Woods (p. 5400). As the defendants' accountant was not in complainant's employ, it is not to be supposed that he had the sources of information on the subject Woods did.

Emerson McMillin was the only one called by complainant to testify to the rate of return. Although the Master said:

> "I will take Mr. McMillin's testimony, and I am going to hear a motion to strike out when all the proof in this case is in. I am not concluding myself by allowing the testimony in, as to whether I will let it stay in or not" (Rec., p. 7840),

it is upon McMillin's testimony alone that the Master based his finding that 8 per cent. is the rate of return to which complainant is entitled.

The Master shut off cross examination of this witness in his usual peremptory fashion and directed him to leave the stand (p. 7882).

When defendants' witness Maltbie attempted to show that he had used the area basis as the method of apportionment in arriving at his figures for certain of complainant's property, the Master said he would not take his testimony (Rec., p. 12649). And yet the Master not only permitted complainant's vice-president, Carter, to testify that he had used the same method but used Carter's figures as the basis of his findings.

The Master refused to permit defendants' witness Boylan to testify in regard to the space needed by complainant in its 57th Street office building (Rec., pp. 13546-13563). This testimony had an important and material bearing upon defendants' claim that complainant's purchase of said building was a reckless and improvident expenditure.

The record contains overwhelming evidence of the Master's interference with cross examination by defendants' counsel. This occurred in the case of almost every witness. When defendants' witnesses were on the stand, the Master went at them as though it was his intention either to disconcert them to the extent that they would not be able to give their testimony coherently or to force them into agreement with his own views. His cross examination of W. F. Hine is one example of many which may be cited in support of the statement that the Master appeared to be determined to argue defendants' witnesses out of their senses (Rec., pp. 13302-9).

It would swell this brief to an unconscionable length to make additional extracts from the record, but we take the liberty of giving one more sample of the Master's tactics.

The defendant Swann presented a gas engineer, A. S. B. Little, of conceded ability (Rec., p. 11349), of vast and

varied experience, who has made gas under various conditions, who has built and inspected plants, who has testified in numerous proceedings (Rec., pp. 11162-11177), and who showed as well rounded a knowledge on the subject of gas manufacture and its cost as could be evidenced by expert testimony.

While Mr. Little was under cross examination by complainant's counsel, the following occurred:

> "The Master: Now, I want to get this perfectly clear in my mind. Your testimony is not that those plants could produce more than they have, operated as they have been, but that with additional facilities and apparatus, they could produce more at these respective plants.
>
> Mr. O'Brien: I am going to object to the questions of the Master as assuming something that the witness did not say, and taking the cross examination of counsel for the complainant into his own hands.
>
> The Master: Objection overruled. I am going to let the witness state whether I correctly understand his testimony.
>
> The Witness: There is some slight change, if I may put it that way, in the apparatus, but the greatest change is in the method of running the apparatus, not in additional equipment and apparatus so much, very, very slight. You remember I stated on direct $4,000 or $5,000 in Astoria would accomplish the result.
>
> The Master: I recall asking you directly yesterday, whether you would assume to say that you could get better operating results than Mr. Woods' as an engineer, and you said, no.
>
> The Witness: I think on direct you will find that I also stated——
>
> The Master: I don't care whether it is direct or cross, I am trying to get the fact clear in my mind.
>
> The Witness: I am trying to give it to you.
>
> Mr. O'Brien: I am going to object here and

protest against the Master entering into an argument with the witness and *trying to convince the witness that his view of the matter, his recollection of the testimony is correct.*

The Master: I am not trying to convince the witness at all, but I am trying to get the facts clear in my mind.

Mr. O'Brien: But you have fallen into the Ransom habit of not letting the witness complete his answer, and the record shows that. With the quick way you have of talking, and incisive manner and all, it does not give the witness a chance to answer fully. The testimony on that matter is clear.

The Master: To you?

Mr. O'Brien: It is clear to me, yes.

The Master: I want it clear to myself.

Mr. O'Brien: But you are entering into an argument, he said so and so yesterday, no matter what he said on the direct. You are simply entering into an argument with this witness, and I want the record to indicate that.

The Master: I am permitting you to indicate it on the record, and I have not interrupted you. Now, I am going to get the fact clear in my mind as to what the witness's conclusion was.

By the Master.

Q. What I want to know, Mr. Little, is this, whether it is your testimony that if you took these plants during 1918 and 1919, and ran them just as they have been run by Mr. Woods, with the same material, same labor, same apparatus, you would have gotten a better result than Mr. Woods did? A. No; first of all, *if I ran them exactly as Mr. Woods did, I suppose I would get identical results.*

Q. Now, during 1918 and 1919, could you have gotten a better result, do you say, than Mr. Woods, by a change in the method of operation? A. Yes.

Q. Excluding from consideration any additional facilities? A. I will say yes, and then I may add, I could get more than that, even, by making some slight changes in the apparatus.

Q. Now, I want you to tell me at this point, so I will have it clear in my mind, what change in the method of operation you would have instituted in 1918 and 1919 to produce more gas in these plants, equipped as they were, with the material and labor that Mr. Woods had at his disposal? A. In the first place, I would run them longer; I would run the retort houses to capacity and not shut them down as they were shut down. If you will remember, I stated in my previous testimony that I did not believe that it was Mr. Woods' judgment to shut them down, though I am not attacking him as an engineer at all. I want to make that perfectly clear.

Q. I want to get it clear in my mind——

Mr. O'Brien: Your Honor, will you let him go ahead and finish that description?

The Master: I thought he had finished it.

Mr. O'Brien: No, he has not.

The Witness: There was another part. Then some more could be made by slight changes.

Q. Yes. I am confining myself now to the operation of the plants without changes? A. I am through with that.

Q. That is what I thought. Now, the Astoria plant A is a coal gas plant, is it not? A. Yes, sir.

Q. What do you understand was the period during which, or the percentage of time that Mr. Woods ran these plants?

Mr. O'Brien: Your Honor, I want to have it noted as to every question that you are asking, that I am protesting against the Master taking over the cross examination of this witness in the midst of Judge Ransom's examination after Judge Ransom has said off the record that he does not feel prepared to go ahead with this examination in the way in which he would if he had not been sick, and had not been working under the conditions under which he has worked.

The Master: I don't quite get the point of your objection. Don't you want me to get the facts clear in my mind?

Mr. O'Brien: I do, but I think you are not keeping within the domain of the Master when you undertake to take over the cross examination repeatedly of every witness in this case.

The Master: Is it the Master's domain and duty to get the facts clear in his mind?

Mr. Chambers: The only thing I object to is, I dislike to have you ask Mr. Little to compare his ability with Mr. Woods' ability.

The Master: I am not doing that, Mr. Chambers. Mr. Little has said that if he ran the retort houses the same length of time that Mr. Woods did, with the material and labor that Mr. Woods had, and without adding any extra facilities, he would not get any better results than Mr. Woods.

Mr. O'Brien: Oh, no, he did not say that. He said if he ran it in the same way that Mr. Woods did, he would not get any different result.

The Master: That is what I have said. He has said the only thing he would have done to get a better result was to have run it more hours, or to a greater extent than Mr. Woods did. I am trying to get clear at this point just what is in Mr. Little's mind on that.

Q. Let me ask you about that, Mr. Little. A. I might say this, I am not referring so much to 1918 as to what they could do now.

Q. I want 1918? A. I will tell you what they did in Plant A, which is the inclined retort. I claim that in January they could have made 310,000,000.

Q. How many hours did Mr. Woods run it? A. I don't know; I can tell you what he made, though.

Q. I have got to have the facts.

Mr. O'Brien: Won't your Honor let him proceed to give the facts, and then you can cross examine him after he gets through?

The Master: I want Mr. Little to have in mind what I am trying to get at. I am very much impressed with Mr. Little's evident fairness and disposition to answer the questions and give the truth and the facts, from his own point of view.

Mr. O'Brien: All I want is the continuity of facts. You come in after he starts to give you a statement as to 1918, concerning which you asked him, then you jump in and ask him a question that disturbs that continuity of thought and naturally it is going to be chopped up.

The Master: But he is not giving me what I want. He says he would have run Plant A more hours than Mr. Woods did. He must then have a memorandum of the number of hours that Mr. Woods ran it, and I want to know how many hours Mr. Wood ran it, and how many hours he could have run it in January, 1918.

Mr. O'Brien: That was preceded by a statement that his exhibit was prepared as of to-day rather than in 1918, but then he said he had some information about 1918.

The Master: You will have to let me find the facts and stop interrupting.

Q. Mr. Little, do you know what I want? A. Yes, sir.

Q. Can you give me that information? A. Not in the way you want it.

Q. Can you give me that information for Plant B in January, 1918? A. No.

Q. Can you give it to me for Plant C? A. No, and I don't think Mr. Woods can.

Q. Then how can you say that you would have run it more hours than he did? A. I can show you what they got.

Mr. Chambers: He can answer that.

The Master: Let me examine him.

Mr. Chambers: You are cross examining pretty closely. He can tell you, he has it right there.

The Master: I am here to get the facts, and I am going to get it.

Mr. O'Brien: I am protesting against the Master's method of cross examining this witness.

The Master: You can protest as long and as hard as you please. This witness has undertaken to say that he could have gotten a better production result from the Astoria plant during 1918 and 1919 than Mr. Woods did, and I am going to find out, if it is possible to find out, how he could have done it without additional apparatus or facilities. When I am done with that, I am going to find out what he would have done with reference to additional facilities, but before I do that I am going to find out the basis of his statement that he could have produced more gas in those two plants during those two years than Mr. Woods did.

Mr. Chambers: He has got it right there, he can tell you.

The Master: I want certain information on it. I can reach the conclusion.

Mr. Chambers: He can't give it to you in the way you want it.

The Master: He can't do it; then I won't take Mr. Little's results.

The Witness: May I tell you why I can't give you what you want?

Mr. O'Brien: Why don't you let the witness talk?

The Master: Because you interrupt so much that I can't get a chance.

Mr. O'Brien: You have just made a statement on this record that he can't do it.

The Witness: I wan't to show you why I can't do it.

The Master: He has said he can't do it; he just said it again.

Mr. Chambers: He wants to show why he can't give it in hours.

The Witness: I will tell you why.

Mr. Chambers: He says that Mr. Woods even can't give it.

The Witness: To get that, I would have to inspect every daily production record of the Astoria Company.

Q. That could be done, couldn't it? A. *They would not let me have it.*

Mr. Chambers: Now, there is your answer.

By Mr. Ransom.

Q. Who would not let you have it?

Mr. O'Brien: The Master is conducting this cross examination, and I object to Mr. Ransom breaking in.

Mr. Vilas: You were just objecting to the Master breaking in.

By the Master.

Q. Assuming now that they would not let you have these daily production sheets, how did you arrive at a conclusion that you could have gotten a better result in January, 1919? Let me have that.

Mr. Chambers: I suggest that nobody interrupt him until he gets that out in full.

The Master: That includes Mr. Chambers.

A. Beginning with Plant A——

Q. Take Plant A to illustrate what I want. You need not bother with the other plants. You say you could have gotten better results than Mr. Woods did in January, 1918. Show me how. A. In Plant A, in January I set up a capacity of 310,000,000 feet. Mr. Woods actually made 308,978,000, just 99.8 per cent. of what I claim should have been made. In February, I claim 280,000,000. He made 278,177,000 or 99.5 per cent. of what I say was possible.

I can give you all the months if you wish, but I might illustrate by going to May.

In May I claim 193,750,000 cubic feet, and he actually made 221,568,000 cubic feet.

Q. They made more than you say? A. Yes, 114 per cent. as against my 100. That indicates Plant A. Mr. Woods ran it to 94.3 per cent. of the restricted capacity that I give as shown fully in my testimony as to certain plants being shut down in certain months.

In Plant B, however, the situation is entirely different. The house has the same capacity almost. I set up 310,000,000 for January as I did in Plant A. They actually made 140,754,000, or only 45.4 per cent.

Q. Do you know what conditions existed in that month that caused that? A. That just brings us right to the point, your Honor, where I stated I am not going back to 1918, but showing the capacity the plant could reach in 1920.

Q. I have got to go back to 1918? A. Then the War Department had certain retorts under its control. You are not fixing the rate for 1918, but for 1920, and I am trying to show what the rate should be for the future.

Q. How about 1919? A. I haven't got 1919.

Q. Why haven't we? A. Let me see to what extent I have it. I can give it to you.

Mr. O'Brien: I don't know whether your Honor appreciates it or not, but taking that last question, "Why haven't you got it"——

The Witness: I beg your pardon; these figures that I gave were for 1919.

Q. Not 1918? A. No, sir.

Q. Then it was 1919 that the War Department had Plant B? A. They had it or the result of their having it would still be shown in the plant.

Q. How about Plant C?

Mr. O'Brien: I don't know whether your Honor appreciates it, the manner in which you put questions to the witness, which carries with it in many of the questions you put, like the last two or three, a rebuke, as it were. You may not appreciate that, it may sound altogether different to you like my voice is perhaps

much louder than I think it is when I am talking. The way you put it just now, 'Why haven't you got it,' the way you said it, has an effect on the witness.

The Master: I don't think I am going to scare Mr. Little.

Mr. O'Brien: I do not think you are, either, but I am telling you so that you will understand my protest.

The Master: Mr. Little is not getting frightened at the way I say, 'Why haven't you got it.'

The Witness: I don't want to be argumentative or anything like that, but I want the answers in the record in clear form, not only for your sake, but for the sake of the record. *Counsel has asked me about my testimony in the case of the People's Gas Company, and the Springfield and other cases, and this is going to be used somewhere else, and if my answers are not clear it is going to do me an injury.*

The Master: I want your answers clear. I am not concerned about other cases in the future, but I want it clear for this record.

Mr. Chambers: You will understand that if you give us more time Mr. Little can work out anything you want, if they would give him the records.

Mr. Ransom: I don't believe he would work out anything you want.

Mr. Chambers: I would not want to take your judgment on that, or anything.

The Witness: All that information, your Honor, is on page 12 of Section 1 of the report that I put in. In other words, the company made in its C plant in January, 1919, 683,707,000 cubic feet. The capacity that I have claimed is 1,023,000,000 cubic feet.

By the Master.

Q. Do you know why there was a variance? A. I take it from Mr. Woods' testimony that they de-

sired to keep some of the other plants running in order to keep their force together.

Q. Let me ask you in that connection, Mr. Little, assume now that Mr. Woods did not run Plant B to the capacity which you say it could be run at, that does not affect the cost of gas, so far as the material used is concerned, does it? A. No, that is, actual material f. o. b. the plant.

Q. Which is the big item? A. That is the big item.

Q. How much does it affect the labor item? A. I think my figures show that. It would be pretty hard for me to give you the percentage.

Q. Does it affect it materially? A. Yes, quite a lot.

Q. Of course, the smaller production would be affected by the taxes and other overheads as bearing on the number of cubic feet produced? A. Yes, sir.

Q. But, as far as material is concerned, it does not make any difference whether you produced this large amount, or a smaller amount in a given plant, the material is just so much material per thousand cubic feet? A. Yes, sir, up to certain limits. Of course, in a small plant where you have to keep your machines hot for twenty-four hours and you only run it six hours, you have coke being consumed to keep it in operating condition, but that would not affect a plant of this size" (Rec., pp. 12190-12201).

And again:

"The Master: Here is the proposition: you have twelve machines.

The Witness: Yes, sir.

The Master: One or more of them has to be taken down for periods of fifteen days to a month to be entirely overhauled every once in a while.

The Witness: Yes, sir.

The Master: Meantime you have to take a machine down every four or five days for rechecker-ing.

The Witness: Yes, one out of the twelve.

The Master: How could you have eleven machines going if you have one machine out of business practically all the time for entire overhauling——

Mr. Ransom: Two.

The Master: No, one entirely overhauling and out of business seven days, and the other machines only last four days, you have got to have at least two all the time.

The Witness: Unless you increase the capacity of the machine.

The Master: I don't care about capacity, Mr. Little, I am talking about machines.

Mr. O'Brien: You see, your Honor is getting argumentative now, and that is why I have to make my little objection here.

Mr. Ransom: To save the witness.

Mr. O'Brien: The taking over of the cross examination of the witness out of Mr. Ransom's hands.

The Master: Well, I can only indicate to the witness that I do not understand his testimony and give him a chance to explain it.

The Witness: I can't explain it unless you will let me go into the capacity.

Mr. O'Brien: You are just getting that Ransome habit, it is infectious, of clipping the tail off of every answer. The witness has tried three times to answer that.

The Master: I don't see how the capacity of a machine makes any difference on the fact that the machines have to come down as the witness has testified.

The Witness: I can explain that in a minute. If you have twelve machines of four million capacity, you make forty-eight million a day. If you only make thirty-three million, you don't have to run eleven or twelve, you would have so many more available for repairs.

The Master: No, but on the basis of your figures how could you do it?

The Witness: Taking on page 5, the eleven sets at three million per day each, and that is what I set up as ordinary, smooth, slow-working——

The Master: How could you do that? That is Judge Ransom's question.

The Witness: You couldn't do it with that capacity that is set up of three million a day, but the machines have a bigger capacity.

The Master: You couldn't do it the way you say on that page it should be done?

The Witness: Not on this page, no" (Rec., pp. 12217-18).

Henry H. Edgerton, who has been engaged in gas engineering and accounting since 1865 (Rec., p. 11045), who was a witness in the prior suit and at that time worked upon the preparation of the case first on behalf of the State and later for the City (Rec., p. 11044), was called by the defendants and testified that every item in the Marwick-Mitchell Company report, which is a tabulation of the cost of the properties of the constituent companies taken over by complainant at the time of the consolidation in 1884 (Rec., p. 11052), was checked by him "with the original manufacturing reports" for the cost of gas and with every one of the books of the old companies that Marwick and Mitchell had for the cost of the real estate (Rec., p. 11051). In his usual brutal fashion and without any evidence to justify his statement, the Master asserted he would not believe Mr. Edgerton's testimony (Rec., p. 11053).

Mr. Edgerton also testified that he had studied in this country and abroad and had been familiar with gas-making apparatus, gas plants and gas-making machinery since 1859 and had been familiar with complainant's plants for some time prior to 1905 (Rec., pp. 11068-9; p. 11074). Although he made a detailed examination of the 14th Street plant, he was not allowed to testify to that fact (Rec., p. 11091), nor would the Master per-

mit him to testify to the condition of the company's plants in 1916 or 1917 (Rec., p. 11098). Counsel for the defendant Swann, having in mind that the testimony should be taken at least for the reviewing court's consideration, requested the Master to allow Mr. Edgerton to testify "for the saving of money here and in future litigation," but the Master replied:

> "Mr. O'Brien, I am not at all concerned with the safety of this case" (Rec., p. 11112).

Among the tables presented by the defendants was one prepared by Charles Frank, statistician for the Public Service Commission, First District, entitled "Consolidated Gas Company, General Profit and Loss Account December 31, 1905, to December 31, 1918" (Rec., p. 10396). Mr. Frank testified that he had had the table checked and that it was a correct transcript of the figures in the company's books. When the defendants offered the table in evidence, the Master ruled it out on the ground that it contained revenues from sources other than the gas business (Rec., p. 10798), although his attention was directed to the fact that Teele's schedules which he had received in evidence on behalf of complainant contained non-operating revenues, and that the purpose of Frank's table was merely preliminary to further testimony on which to base other tables showing the revenues derived by complainant from its gas business (Rec., pp. 10398-9). It was quite important for the defendants to show all the sources of complainant's income, both from gas and non-gas and then, as Teele did, eliminate those that are non-gas. Frank's table was prepared and submitted out of an abundance of caution. Without it, the complainant would undoubtedly have protested that defendants had not done as it had, namely, given tables from which could be computed its income from the gas business.

Mayne S. Howard was called by the defendants and testified to a tabulation (Defendants' Exhibit AA-451, Rec., p. 13014) of the defendants' claims as to taxes for the years 1906 to 1918, inclusive. Mr. Howard stated he had used the company's application for correction of the 1919 personal tax assessment (Rec., p. 13012). He was cross examined in due form by complainant's counsel as to his division of this tax and, although there is nothing in the record which justifies it, the Master offered the gratuitous insult to the witness that he had taken advantage of all the claimed deductions and given complainant no benefit when he made his apportionment (Rec., p. 13739).

On the trial the defendants requested complainant to give them certain data as to the gas made and sent out.

When tables purporting to give this information were produced by the complainant, the Master marked them in evidence as Defendants' Exhibits AA-524, AA-525 and AA-526, despite the defendants' protest that the tables do not give what defendants had called for (Rec., p. 15376).

In *Dryer* v. *Ershowsky*, 156 App. Div., 27 (N. Y.), the Appellate Division said concerning the attitude of the Trial Court:

> "While it is true that the manner in which a witness shall be examined is largely in the discretion of the trial judge, it must be understood that we have not adopted in this country the practice of making the presiding justice the chief inquisitor. It is better to observe our time honored custom of orderly judicial procedure, even at the expense of occasional delays, and while we recognize the commendable zeal which prompted the learned justice to expedite the litigation, it must not be forgotten that the trial of a lawsuit is an important event to the parties and they must not only receive

justice, but must be made to know that justice is being administered.

The Judge is an important figure in the trial of a cause and while he has the right and it is often his duty to question witnesses to the end that justice shall prevail, we can conceive of no other reason for him to take the trial of the cause out of the hands of counsel. It is better that he should conduct the trial with such deliberation that the scale may seem to balance at every stage of the progress of the trial."

In *Kleinbert* v. *Federal Brewing Co.*, 107 App. Div., 485, it was said:

"* * * Generally speaking counsel has a right to present his theory of the case or at least to offer or present it without being accused of duplicity, ignorance or bad faith, and when the trial Court transgresses the rights of litigants, it is the duty of appellate courts in the interests of the orderly administration of justice to reverse the verdict and send the case back for a new trial."

In *Hintenstein* v. *Bindseil*, 164 N. Y. Supp., 102, where at the close of the direct examination of one of the defendants, *in which the judge took an active part*, and thereafter made remarks showing his belief as to the merits of the case, before its conclusion, the Appellate Court, said:

"There was no jury to be affected by this remark, but it shows the Court decided the case before the proofs were in. Furthermore such a statement was calculated to have an effect upon the attitude of witnesses, during the remainder of the trial that may well have been prejudicial to the rights of the plaintiffs, who were thus to all intents and purposes prematurely put out of Court. A disingenuous or evasive or dishonest witness for the side towards which the Court has shown such a leaning is emboldened that the court is favorable to the party for whom he is testifying; while a

> timid witness on the other side is made more timid and may even be induced by the court's attitude to change his testimony."

We repeat that the Master began the trial of this case with the decided predilection, which amounted to an obsession, that the high level of prices caused by the World War were here to stay for at least five years beyond the time of his report. When we add to this prepossession his determination to adhere to his own views in spite of contrary rules and precedents—maintained, as he crudely expressed it, by scandalously incompetent judges—it is not surprising that defendants' counsel and defendants' witnesses were denied the opportunity of presenting their views and giving their testimony. It is no answer to say that the Master's errors have been cured by Judge HAND's decision. Such an assertion would not be consonant with the facts. Much evidence offered by appellants was excluded by the Master, who even refused to mark many papers for identification. It follows that Judge HAND could not cure the omissions when he had no means of knowing what appellants sought to show by this excluded evidence. It is true that here and there Judge HAND made a few relatively insignificant deductions from the Master's allowances. It is equally certain that the learned Judge relied too strongly upon the hasty assumption that because, out of "the mass of testimony taken" there is sufficient upon which to base findings, it necessarily follows that the Master's treatment of defendants' counsel and defendants' witnesses is unimportant. The greater part of the record is composed, not of testimony, but of colloquies between the Master and defendants' counsel and arguments between the Master and defendants' witnesses. As we have endeavored to show, these colloquies and arguments were due entirely to the Master's stubborn insistence upon his own point of view

and his overwhelming desire to argue every one who opposed him into agreement with it. Had Judge HAND been able to conquer the dismay caused by his unfounded belief that it would be necessary for him to wade through the interminable bog of this record, and reviewed the occurrences before the Master to which we have directed this Court's attention, we are confident he would have refused to confirm the Master's report.

There are other errors discussed in subsequent points of this brief which require the dismissal of complainant's bill of complaint. If the errors directly traceable to the Master's bias were the only ones of which appellants complain, they alone would be sufficient to call for the reversal of the judgment.

II.

For the purpose of making a fair test of the statute, the period found is altogether too brief.

The Period Selected by Complainant.

Complainant based its contention that the statute is confiscatory, upon the period from the time the statute was enacted down to the time the complaint was verified, namely, January 16, 1919. The complaint alleges:

> "* * * and there now exists an aggregate deficiency in your orator's earnings below 6 per cent., since the date the said 80-cent gas rate was made effective, in the amount of at least $12,000,000 (Complaint, Par. XII)."
>
> "* * * and at no time since the said rate went into effect, has it permitted your orator to earn a fair return thereon (Complaint, Par. XVI)."

The Period to Which the Master Erroneously Confined the Testimony.

The Master declined to take any testimony as to the condition of the plants from 1906 to 1917 or as to whether any particular piece of property was used or useful during that period (Rec., p. 11110).

The Master's refusal to take said testimony was apparently based upon his conclusion that complainant had earned a fair rate of return from 1906 to December 31, 1917. He stated:

> "* * * There won't be and cannot be evidence which would justify a finding that they did not get a fair return down to December 31, 1917" Rec., p. 11117).

The Period Found by the Master.

Although the Master took evidence over a period of twenty months, from January 1, 1918, to August 31, 1919, his conclusion that the statute is confiscatory is based upon the first eight months of 1919. He stated:

> "Having in mind that the complainant must prove its case beyond any reasonable doubt, I reached the conclusion that the safest basis upon which to work was the actual result of operations in the Astoria plant for the eight months ending August 31, 1919" (Rec., p. 52-a).

The Period Decided by Judge Hand to be the Proper Test.

There are several aspects of Judge HAND's decision of what is the proper period for a test, which make it impossible to agree with his conclusions. He apparently assumed that the Master's finding of confiscation is based upon a period of twenty months, namely, from January 1, 1918, to August 31, 1919. To this period he adds the eleven months intervening between August 31, 1919, and the date of his decision, August 4, 1920; indulges in the prophecy that the then existent high price levels would continue *at least five years longer* and found that "plaintiff is faced with a condition which permits it to receive much less than the return which the statute contemplated *and which the Constitution is thought to insure it*" (Rec., p. 141-a). (Italics ours.)

It is respectfully submitted that the italicized part of Judge HAND's opinion discloses an erroneous conception of the Constitution, which explains but does not justify recent judicial decisions in gas rate litigations.

No public utility has a vested right to returns which are insured to it by the Constitution under any and all conditions. Of course, we do not contend

that the property of a public utility, or any other property, is not entitled to protection from confiscation. We maintain, however, that there may be circumstances in which a public calamity is so general in its character and so widespread in its scope, that the right to profits from invested capital must temporarily be suspended. We have precisely that situation in the instant case. During part of the period covered by Judge HAND's decision the entire civilized world experienced a degree of hardship and misery without precedent or parallel. The Black Death which in the fourteenth century destroyed nearly one-half of Europe's population affected a comparatively small part of the world's activities. The paralysis of industry and productive capacity caused by the recent great war was felt in every quarter of the universe. To carry on the conflict there were swept out of existence resources of capital so vast as to defy realization by the mere recital of figures. Ten millions of men were killed and an equal number were wounded, maimed and rendered incapable of effective industry. After hostilities ceased, business depression everywhere became so prevalent, as to cause privation and suffering. To hold that, while these abnormal conditions continued, the complainant must have its profits, while millions were strained to the breaking point to gain a bare subsistence is to give to the Constitution a meaning its framers never intended.

In *Steenerson* v. *Great Northern Ry. Co.*, 72 N. W. Rep., pp. 713, 721, the Court said:

> "*There is no constitutional principle which guarantees the capital invested in railroads immunity from business vicissitudes* to which capital invested in all other enterprises is subject. * * * The courts should take notice of the general depression in business prevailing in 1894." (Italics ours.)

In *Matthews* v. *Board of Corporation Commissioners*, 106 Fed. Rep., 9, the Court said:

> "It is said, however, that the net profits of the good years should be appropriated to make good the losses of the bad years, but it must be remembered that these bad years from 1891 to 1895 were years of panic and general depression. All investments of every character suffered. *The grant of a charter to a railroad company does not guarantee that it will or can make the investment at all times a paying one. A corporation is not entitled as of right and without reference to the necessities of the public to realize a given per cent. on its capital stock* (*Turnpike* v. *Sanford*, 164 U. S., 578)." (Italics ours.)

In *Knoxville Water Company* v. *Knoxville*, 212 U. S., 15, the Court said:

> "The operations of the preceding fiscal year or of any other past fiscal year, *were valueless if the year were abnormal* and were only of significance as they foretold the future." (Italics ours.)

In *Darnell* v. *Edwards*, 244 U. S., 564, 569, the Court said:

> "The evidence for complainant tending to show they were non-remunerative while based upon actual experience in the operation of the road, yet relates to only a brief period *when conditions were abnormal*." (Italics ours.)

The opinion of Judge LEARNED HAND was based upon an assumed continuance of a prolonged period of high prices. He said:

> "The recent rise in prices is not of this kind, because there is no reason whatever to suppose that during the next period of say five years, which is long enough to justify some present ac-

> tion, the same causes will operate in reverse as have operated in the past. * * * It is quite true that if these prices could fairly be regarded as such temporary aberrations as the rate was meant to cover this would not be so. Persons who embark their money in such enterprises must take the bitter with the sweet, and the lean years with the fat. * * * Several reasons lead me to believe that the present price levels are not merely transitory, though I recognize the danger of any prophecy" (Rec., p. 141-a).

Judge HAND recognized the danger of prophecy and in that respect his anticipations have been realized. His decision was rendered on August 4, 1920, and *five months* had not elapsed, much less *five years*, before a reversal in trade conditions had taken place which, so far from being similar in the time required to bring about the fall as compared with the period during which the advance occurred, represents something unparalleled in history and beyond the wildest dreams of business men in the summer of 1920, when the peak of prices had been reached.

Since Judge HAND's decision, George B. Cortelyou, president of the complainant company, announced a reduction in the price of gas from $1.50, the rate fixed by itself, to $1.25 and stated that this reduction was due to the fact that the price of gas oil had been cut practically in half.

Since the entry of the decree in the instant case, steel plants, textile mills, railroads, express companies and other industries have been readjusting war inflation wages, cutting war inflation production costs, and lowering war inflation prices. These events are of common knowledge; and they are, therefore, matters of which this Court will take judicial notice.

The next decision which appeared after Judge HAND's opinion in the *Consolidated* case was rendered

by Judge HOUGH on October 13, 1920, in *Kings County Lighting Company* v. *Nixon, et al.*, 268 Fed. Rep., 143. The learned Judge said:

> "The point is that the eighty-cent rate is confiscatory not because it does not yield a sufficient percentage on capital, but because to produce it at that price, consumes capital. Neither the *Wilcox* case nor any other decision can be cited to show that any definite or fixed period of experimentation is a necessary prerequisite to a suit of that kind. If plaintiff were getting any return at all another question might be presented, but to me it is a matter of no doubt whatever that a year and a half is a long enough time to experiment with proved capital losses before applying for relief."

There is no analogy between the *Kings County Lighting* case and the instant case. Complainant makes no claim that to produce gas at the 80-cent rate it is necessary for it to draw upon or consume its capital.

While we contend that Judge HAND's figures should be higher, he found the rate of return, after imposing upon the consumers the Federal Income Tax,

	1918	1919
"Excluding franchises	5.08%	3.28%
Including franchises	4.53%	2.92%."

Following the *Kings County Lighting* case came *New York & Queens Gas Company* v. *Newton, et al.*, 269 Fed. Rep., 277, decided by Judge MAYER November 3, 1920. The learned Judge briefly, and as it seems to us, hastily said:

> "The year 1919 is in this case a sufficient basis for the calculation of the cost of production and the 'rate base' for a future long enough to call for some judicial action (*Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y., 89; *Consolidated Gas Co.* v. *Newton, et al.*, and *Kings County Lighting Co.* v. *Newton, et al., supra*).

> The opinions of Judge Cardoza, Judge Learned Hand and Judge Hough in the cases just cited, fully set forth the reasons for this conclusion and with those reasons on this point I am in full accord."

In *Municipal Gas Company* v. *Public Service Commission*, 225 N. Y., 89, 98, 99, the question of what is a proper period for a test was not squarely presented. The case arose on demurrer. The only question before the Court was the adequacy of the complaint which alleged, among other things, that for the year 1917 the return was unfair; that for the first half of 1918 there was a deficit and for the entire year following, there would be a still greater deficit. Speaking of these allegations Judge CARDOZA expressed himself in such a way as to induce the inference that he had no intention of prescribing any fixed definite period by which it could be held under any circumstances that a rate statute must be held confiscatory. He stated:

> "For more than nine years, the statutory rate was adequate. Abnormal conditions brought about a change, and now, when the return is figured upon the value of the property, the outcome is said to be a deficit. The defendants argue that courts must pay some heed to the average results; that the prosperity of one year may atone for the adversity of another; and that confiscation does not ensue unless there has been an unreasonable extension of the period of dearth. *That dearth does not signify confiscation unless unreasonably prolonged, may be assumed to be true* (*Darnell* v. *Edwards*, 244 U. S., 564). The difficult thing is to determine where the line is to be drawn. Its location will vary with the nature of the business, the exigencies of the present and the chances of the future. There is no other test than the rule of reason and fairness (*Cedar Rapids Gas L. Co.* v. *City of Cedar Rapids*, 223 U. S., 655, 669). One

cannot crowd the governing principle into any formula more definite. It will seldom be important that rates have been inadequate for a day or a week or a month. *Fleeting losses may be suffered and yet the balance sheet may show a profit.* Prolong the losses, however, for a year, and you may reach and cross the danger line. It is by the average of the year that business commonly reckons its losses and its gains. *On the other hand, there may be times when the average must be distributed over periods still longer. We make no attempt to solve these problems now. We cannot solve them fairly until all the evidence is in. Then only can the changes and chances of the business be probed and measured.* The case is here upon demurrer. The only question to be determined is the adequacy of a plea. * * *

We have allegations that the bounds of moderation have been passed; that confiscation has resulted and will indefinitely continue. Unexplained and undenied, these allegations make out a *prima facie* case of the denial of a just return. It may, of course, be impossible to prove them. The deficit when analyzed may be dissolved. The apprehension of evil may be the vain forebodings of timidity. The conditions engendered by the war may linger for months or years, or may vanish with the coming peace. Those questions are for the trial." (Italics ours.)

In the instant case, counsel for complainant agreed with the Master that the period was abnormal.

"The Master: You do not claim, Judge Ransom, that because at this particular time things that you have, matters that you use in the manufacture of gas and of unusually high cost—that that must be the basis of the determination?

Mr. Ransom: We do not, of course, rely upon anything which is abnormal or anything which is out of the ordinary as an average condition. That is, we do not stand merely upon what you may

call war costs as such, or abnormally high prices as such. We present the whole situation" (Rec., p. 483).

And again:

"The Master: * * * These peculiar war conditions cannot in a sense make this case" (Rec., p. 4325).

"When I come to fix what I think is the average usual proper cost of producing and delivering gas, I shall not be affected very much by the temporary condition that existed during the war. * * *" (Rec., p. 4347).

"* * * My present judgment is, unless I change my mind, that in view of the peculiar and difficult situation arising in 1918, that I shall disregard that year entirely in my present calculations. That is my present view about it" (Rec. p. 4610).

The Master finally used his "present judgment" as the basis of his findings. We repeat the quotation from his statement which we used near the beginning of this point:

"* * * I reached the conclusion that the safest basis upon which to work was the actual result of operations in the Astoria plant *for the eight months ending August 31, 1919.*"

Conditions which this country experienced during the past few years are without a parallel in the history of a nation. The Court will take judicial notice of the fact that the European struggle began in August of 1914 and the World War in April of 1917 when the United States declared war upon Germany.

Long before America's entry into the war industrial and social conditions in this country were seriously affected by the war in Europe. Labor and materials increased in price. This country was called upon to send

large quantities of supplies abroad. The radical change in conditions became more marked in the latter part of the year 1916 and early in 1917 when our entry into the world tragedy began to seem inevitable. With the declaration of war and the passage of the selective draft measure, men flocked to the colors from farm and factory all over the country, with the result that over two millions of men, the flower of American manhood, were transported abroad.

Thousands, hundreds of thousands, of those who did not go into active service took up work in shipyards, cantonments and ammunition factories. Thousands of others, let it be said to the glory of the nation, abandoned their accustomed avocations and participated in war activities that they might help win the war.

Congress used every available power in passing measures to help win the war. Governmental bureaus, commissions and administrative departments were created with broad powers to carry out the purposes of their mission. Thus food and fuel, commerce and labor, were subjected to direct, and we may say, absolute control. A sweeping, radical step was taken when the Government assumed control over the railroads of the country. The telephone and telegraph systems of the country likewise came under Federal control and management. The domination of a Federal Food Administration affected every household in the land. Fuel was turned over to the supervision and control of a Fuel Administrative Board, which board dominated the distribution of fuel and, to a large extent, fixed the prices at which it should be sold.

Appreciating at an early date what an important factor Labor was in the conditions that confronted the country, the Federal authorities created a War Labor Board which exercised sweeping powers, so that fric-

tion and controversy, dissension and discontent might be reduced to a minimum.

Thus every condition, every relation, between man and man, and men and the Government, both with regard to person and property, was directly and radically affected by the country-wide, solemn, serious, patriotic purpose—to win the war.

All through the testimony in this case the effect of the world war upon conditions surrounding the operation of the complainant's plant is clearly shown.

How the hand of the government was directly involved in creating increased expenses for the complainant company is shown also by other testimony.

The Master repeatedly stated that he would not take into consideration this abnormal period (pp. 483, 4325, 4610, 5347).

One of the latest cases decided in the New York Supreme Court was that of the *Kings County Lighting Co.* v. *Lewis*, 110 Misc., p. 204. Mr. Justice GREENBAUM said:

> "It is clear that confiscation may not be predicated upon the operations of the plaintiff for 1916 and 1917. As to the years 1917 and 1918 it must at the outset be said that those years were abnormal, owing to the war conditions then existing.
>
> As to the year 1918 the question that confronts one is whether confiscation should be based upon such a year, even if it be established with reasonable certainty that the plaintiff's income was thereby reduced to a point which concededly would not be ordinarily deemed an adequate return upon the capital invested.
>
> In the case of a private business the owner may meet the rising cost of labor and material by a corresponding increase in the price of merchandise which he sells. A public service corporation is limited by the rates imposed by law. The merchant, however, is frequently confronted by con-

ditions, such as change of styles or fluctuation in price of materials, by reason of which the result of the year's business is a loss. Should not a public service corporation also expect to be confronted by the risks of loss arising now and then as incidents of business enterprises? The government in granting a franchise to a public service corporation does not guarantee a profit at every moment of the corporation's activities. All that such a corporation is entitled to is protection against inadequate returns upon its investment which are likely to continue for such a length of time as would result in the impairment of a very substantial portion thereof, or a deprivation of an adequate return upon the capital.

The operations of a fiscal year which was as abnormal as was the year 1918 lack the value of a normal year in determining the future.

In this connection it will be instructive to study the opinions of the courts as to what is meant by a fair return and what period of time should be taken into account in determining the fair return and to what extent abnormal conditions may affect the question of inadequacy of return."

It is clear from the testimony of the witnesses who testified in this case how the governmental control over supplies like coal and oil and the diverting of these materials to war uses directly affected the price which had to be paid for these materials by the complainant herein. It is also clear that the current or prevailing wages in the labor market were directly affected by the Act of Congress in declaring war and the subsequent passage of the selective draft law, which took out of the labor market hundreds of thousands of young men.

That there has been a recession from the abnormally high prices caused by the Great War, sufficient in extent to justify the denial of applications by public utility corporations for increases in rates, is evident from recent

decisions by Public Service Commissions throughout the country.

The Maryland Public Service Commission said:

> "The commission fully realizes that in view of the numerous reductions in prices which have occurred in the last few months the time is not opportune for any increase in rates."
>
> *Re Consolidated Gas, Elec. Light & Power Co.*, P. U. R., 1921, A-649.

The Illinois Public Service Commission said:

> "It is clear that the inevitable reaction from war prices is already well under way in this country and the signs of financial depression now so prevalent about us cannot be ignored. While thus far lighting materials have been practically unaffected by the tendency of lower prices, it must be evident to even casual investigators that industrial depression must effectively operate to reduce the prices of oil, coal and other materials essential to the production of gas, electricity and other utility services. It now is a matter of almost daily testimony before the Commission that labor has increased in efficiency within the past few months.
>
> Therefore, in order to protect the interests of the utilities and the consumers of their services, it is important that advances of rates in the face of adverse economic conditions shall be made with circumspection lest undue hardship be worked upon the public."
>
> *Re Freeport Gas Co.*, P. U. R., 1921, A-687.

In a more recent case the Illinois Public Utilities Commission *in re Metropolitan West Side Elev. R. Co.*, P. U. R., 1921 B, page 293 (Opinion, January 4, 1921), said:

> "Further, it must be manifest to all that our nation is now upon the threshold of important

economic readjustments which will hasten the return to normal industrial conditions. The trend towards lower prices is too pronounced to be ignored, and its effects may properly be taken into account by us in the instant case as it has in the recent past."

The New York Public Service Commission for the Second District said:

"It is quite apparent now that these prices experienced by this petitioner were abnormal, and also that they were temporary. The peak has been passed, and reductions are already in progress. It appeared from the evidence of the witnesses called in this case that in the Hudson Valley the price prevailing not long ago for bituminous coal of $9 at the mines had shrunk slightly prior to the hearing held in November to $5. This emphasizes the fact which follows, not only from the evidence in this case, but from general conditions known to this Commission, of which we should take notice, that the exceedingly high prices lately experienced are transitory. They form no safe basis for rate making in an attempt to compute a reasonable return for the future. On the other hand, it would be equally unjust to have recourse to pre-war prices or to conditions which formerly maintained in this industry, because there is no reasonable assurance that they will be entirely restored within any short period of time.

There is one respect as to which our duty is quite plain in view of the abnormally fluctuating costs of material, and that is that any order which is to be made at the present time, in a case like this, should not be of very long duration, and should cover only a limited period, during which time the actual experience will be a valuable guide to further action appropriate in the premises."

Re Kingston Gas and Electric Company,
P. U. R., 1921, B, 76, 82-3.

III.

The statute is presumed to be constitutional. The burden of proof is on the complainant to prove the contrary beyond a reasonable doubt.

The higher Courts, both State and Federal, have laid the greatest emphasis upon the quality of proof which must be adduced by those who assail a statute as unconstitutional. These decisions have a peculiar aptness when considered in the light of the meagre minimum of testimony presented by complainant.

In the former trial, *Willcox* v. *Consolidated Gas Co.*, 212, U. S., 19, this Court said at page 41:

> "The rates *must be plainly unreasonable* to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just, both to the owner and the public (citing *San Diego Land and Town Co.* v. *National City*, 174 U. S., 739, 757; *Same* v. *Jasper*, 189 U. S., 439, 442).
>
> *The case must be a clear one* before the Courts ought to be asked to interfere with State legislation upon the subject of rates, especially before there has been any experience of the practical result of such rates. In this case, the rates have not been enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement before they came into actual operation.
>
> Upon a careful consideration of the case before us, we are of opinion that the complainant has failed to sustain the burden cast upon it of *showing beyond any just or fair doubt* that the acts of the Legislature of the State of New York are in fact confiscatory." (Italics ours.)

Without making extended quotations from the authorities, we may state they uphold the following propositions:

1. The burden of proving that the statute is unconstitutional is upon him who asserts it.

2. This burden must be sustained by evidence which establishes the complainant's case beyond a fair, clear, just, rational or reasonable doubt.

3. The judicial power of declaring laws unconstitutional will not be exercised by this Court except in the clearest cases.

Detroit United Railway v. *Detroit*, 248 U. S., 442;
City of Knoxville v. *Knoxville Water Co.*, 212 U. S., 8;
Minnesota Rate Cases, 230 U. S., 352, 499;
In re Young, 209 U. S., 123, 165;
Atkinson Ry. Co. v. *U. S.*, 232 U. S., 199, 221;
Lincoln Gas Co. v. *Lincoln*, 223 U. S., 357;
Des Moines Gas Co. v. *Des Moines*, 238 U. S., 153, 163;
Railroad Commissioners of Louisiana v. *Cumberland Tel. & Tel. Co.*, 212 U. S., 423;
Shepard v. *Northern Pacific R. R. Co.*, 184 Fed. Rep., 165;
Palatka Water Works Co. v. *Palatka*, 127 Fed. Rep., 161;
Sinking Fund Cases, 99 U. S., 700, 718;
Fletcher v. *Peck*, 6 Cranch (star page), 128;
Montana W. & S. R. Co. v. *Morley*, 194 Fed. Rep., 991.

In a recent decision in a case tried in the New York Supreme Court, *Kings County Lighting Co.* v. *Lewis*, *ante*, Mr. Justice GREENBAUM said:

> "It must, however, always be borne in mind, that in rate cases the burden is on the plaintiff to establish confiscation beyond doubt."

IV.

Complainant's books of account, erroneously admitted in evidence over defendants' objections and exceptions, are not *prima facie* proof of their contents.

The books admitted are, Sundry Debtors' Blotters, Operating Ledgers, Operating Journals, Sundry Creditors' and Sundry Debtors' Ledgers, Invoices Approved by Executive Committee, Treasury Cash Book, Payroll Summaries for 1918 and 1919; and Operating Ledgers for 1906 to 1917, both inclusive (Complainant's Exhibits Nos. 188-200, 204, 260-280).

The books admitted are transcripts of other books, records and papers, many of which were not proven or even produced. That none of them is a book of original entry, is apparent from the testimony of the only witness who was called by complainant ostensibly to substantiate them. He merely indentified them.

Henry M. Brundage, one of complainant's assistant secretaries in the employ of the Consolidated Gas Company since 1903 and whose duties now are to supervise and direct the keeping of complainant's accounts (Rec., pp. 1411-12), testified:

> "All of the record in these books, come to us from the various departments of the company. They are supported by pay-rolls representing expenditures for labor, all of which are vouched for through our system and approved in each individual instance by the *superintendent of the department.*
>
> They come to us from petty expense vouchers which are likewise *vised and approved* by the superintendent of each department making the *expenditures.*

> They come to us from sundry creditors' vouchers, each of which is required to be supported by a receipted voucher signed by the superintendent who receives the goods, checked by the purchasing department as to prices, checked against the general office copy of the order upon which the goods were purchased, verified as to mathematical accuracy and passed by the auditor.
>
> We also get interdepartmental vouchers representing material transferred from department to department and we also get reports monthly from every department recording the operations of that department, which lead to journal entries in our general books of account."

None of the superintendents and auditors referred to by the witness and *none* of the employees who made the entries in any of the underlying records was called to testify to their accuracy. The *only evidence* upon which the Master admitted the books was that given by Mr. Brundage, whose testimony as to the correctness of the books was purely secondary and hearsay. The Master himself conceded that Mr. Brundage was not able to testify to the correctness of any entries in the books (p. 1577).

Mr. Brundage also testified:

> "The big items in the gas manufacturing business are coal, oil and labor. We will take the coal.
>
> A record is maintained in the manufacturing station as to the quantity on hand, we will say at the beginning of the month. All coal that is delivered during the month is weighed by the receiving station, entered in a log book, and a permanent record maintained at the station by the clerk of the station as to the receipt of coal. This record provides a means by which the superintendent is enabled to say that on a given date from a certain shipper he received a certain quantity of coal, and that receipt voucher comes to the ac-

counting department and forms a part of the basis upon which the accounting department is justified in approving that bill for passing through the accounts.

Mr. O'Brien: I object to these conclusions being read into the record.

The Master: I have taken those words, 'justified in proving' as simply a method of explaining his accounts.

Mr. O'Brien: I think he ought to be cautioned to simply cut out these conclusions and state the purpose of a certain method of keeping the books.

The Master: My experience has been that there is no sense in cautioning witnesses, because they will fall into the habit of using those words anyhow, which are not especially important. They do not mean anything. He says they prove up and they justify; that to my mind simply carries the idea what they have been for. That is the way I describe that.

Mr. Ransom: That is the system.

The Witness: Pardon me if I use the laconic terms, your Honor.

The Master: That is all right. I can see, as I suppose we all can, that Judge Ransom is trying to lay the foundation for offering in evidence the books and records of the concern as indicating expenses, outlays and operating results. We might just as well have this all on the record, and we will have the question before us as to how far he can go.

Mr. O'Brien: I think this prepared speech being read into the record 'that we proved this and justified that'——

The Master: It is not a prepared speech.

Mr. O'Brien: What?

The Master: It is not a prepared speech.

Mr. O'Brien: I do not know what it is; you can call it what you want, but I am going to object to it.

The Master: Objection overruled.

Mr. O'Brien: The witness can state *modus operandi* of keeping the books.

The Master: That is what he is doing.

Mr. O'Brien: Without getting in questions of law.

The Master: Your motion to strike it out is denied and exception.

The Witness: From the coal pile coal is taken for use in the generators or retorts, as the case may be, and the coal is run across a scale and the weights taken. A record is kept of the coal so used, which goes to the station clerk, who records it in a record and such record maintained for a month gives him information as to the amount of coal which he has drawn from the coal pile during that month, and that report comes to the accounting department as to the coal used in actual manufacture and leads to the entry in the company's books of account crediting the coal pile and charging the production cost with the coal so used.

In respect of oil the essential procedure that I have described is maintained. Oil comes in and as it comes in the weight of the tank is taken and the measurement of the amount of oil in the tank in the beginning, the amount of oil taken into it, and as oil is withdrawn a record is maintained in the station and transferred to the books of account, crediting the oil stock and charging the production cost with oil so used.

With respect to labor at the stations the records taken by the timekeeper or in a small station by a foreman, reciting the amount of time spent by each individual laborer or workman, and the work upon which he was engaged. This record goes to the station office, it is maintained as a record there and from it a report is prepared for each individual workman by weeks, showing the amount of time that he labored and the account to which the work is to be applied. These weekly cards for each individual workman are submitted to the superintendent of the station, who initials each individual card, and those cards

come to the general office, payroll department, and from those cards the payroll is made up.

The Master: Now, take some other department—department of streets and mains.

The Witness: We have an account called the mains and services department.

The Master: How did they run their account?

Mr. Ransom: Has he mentioned anything about oil?

The Master: He has passed oil.

The Witness: Coal, oil and labor, those are the three big accounts.

Coming to the street department, the big items of expenditure at those departments is in labor and cast iron pipe. The matter of labor at the street department is kept in the case of a small job by the district foreman, in the case of a large job it would justify the employment of a timekeeper. He keeps a record of the men in his jurisdiction, and I might say, your Honor, that of course in the street department are small gangs working in a dozen or hundreds of places throughout the city, under the jurisdiction of a foreman, and each gang in turn under the jurisdiction of a district foreman. A record is kept of the amount of time for each laborer, each workman, verified by the timekeeper or district foreman, transmitted to the branch street department where it is recorded and from which these weekly individual time cards, showing the name of the man, the amount of time labored and the work on which he is engaged. The card is signed by the superintendent in each case, each individual card, sir, and is then transmitted to the general office payroll department, from which the payroll is made up and the classification established.

Material for the street department, as I said, the large item is castiron pipes. Castiron pipe is usually bought under contract. The pipe is delivered at the yard and as it comes in is recorded by the yard foreman as to the quantity and size of pipe received and from whom. That record is

kept in the branch street department and a receipt voucher indicating that on a certain date the company received from a certain shipper so many tons of a certain sized castiron pipe. The receipt voucher comes to the accounting department and forms one of the bases upon which to pass the shipper's bill for the pipe.

As the pipe is withdrawn from stock for the purpose of new mains or repairing old mains, the yard foreman gets a proper authorization from the superintendent to deliver at a certain point, or to a certain foreman a specified quantity of a certain pipe. The yard foreman keeps this record and at the end of the day turns it into the branch street department, showing that he has delivered the quantity of pipe he was ordered to. The street department keeps these records during the month and at the end of the month transmit to the general office a statement of the tonnage and size of each kind of pipe delivered, and the purpose for which it was employed, and that leads to an entry in our general books of account, crediting the stock account with pipe and specials and charging the proper accounts for the pipe so used" (pp. 1417-1422).

The accuracy of reports of material on hand is tested by taking an inventory (Rec., p. 1435).

No one who took an inventory was produced by complainant.

All of Brundage's testimony thus far quoted is purely hearsay. Over defendants' repeated objections and exceptions, it was allowed to creep into the record, under the guise of a description of complainant's accounting system. We have an illustration of this vicious method of "proof" in the following:

"Q. Now, how about the tests which are made in the regular course of business as to the gas oil and coal used? How are those made? A. The accuracy of the gas oil for example, I have de-

scribed this morning the accounting routine by which oil is received and used and accounted for. The results of the use of oil produced a computation showing the gallonage used per thousand feet of gas made, and the gas engineers know approximately the——

Mr. Chambers: Now, if your Honor please, he is going into the——

Mr. O'Brien: (Interrupting.) Your Honor, I am going to urge you to terminate this line of testimony now.

The Master: Let me hear that question.

Mr. O'Brien: This witness is not qualified as a gas engineer, he is going to give us some statement that—he has half emitted some dictum here about some methods of gas manufacture. Now, I think it is clearly inadmissible to attempt to have the witness explain what he calls tests here.

Mr. Ransom: Tests of accounting.

Mr. O'Brien: That is not a test of accounting, it is a test of the gas plant, the manufacturing plant.

The Master: Let me get the question and his answer so far as it has gone.

Mr. O'Brien: He is not qualified, your Honor. If he is going to be put in here as an expert, then we want to have a chance to examine him as an expert accountant.

Mr. Chambers: When interrupted he was saying that gas engineers know——

The Master: (Interrupting.) Let me just get the question and the answer so far as it went.

(The question and answer were read by the reporter.)

Mr. O'Brien: Now, your Honor, you see we are passing over from the domain of accountancy into the gas engineering.

Mr. Ransom: I think he may state the method, of course.

The Master: The objection is made to that statement as to what gas engineers know.

Mr. Ransom: I would be willing to have that stricken out.

The Master: I will strike out the last part of that statement, that gas engineers know.

Mr. O'Brien: Will your Honor also strike out beginning with the words 'the accuracy we have described this morning.' I don't think this witness ought to be allowed to color this record by jerking in accuracy and other such terms describing the way they keep their books. We will find out how accurate they are.

Mr. Ransom: Mr. O'Brien wants to do all the coloring of the record himself.

The Master: I won't disturb that expression by the witness. Proceed.

Mr. O'Brien: We have got the books here; let him take the books and show the *modus operandi*. We don't need his language describing that. He has got the books here.

The Master: I will pass on that when we come to it. You have not finished.

The Witness: If I have not, I will do so now, if I may.

The Master: You stated that you have already stated the system of keeping the record of the oil and fuel supplies that go in and go out. Now, you are talking about a test?

The Witness: I am.

The Master: Go ahead.

The Witness: From these records in the department we make a computation showing the gallonage of oil used per thousand cubic feet, and that record passes through the jurisdiction and under the scrutiny of the engineer of manufacturing as well as the accounting people, and if——

Mr. O'Brien: It does not take an expert to compute the thousand feet, does it, per gallon of gas?

The Master: Now, Mr. O'Brien, let the witness finish his answer. I rather expect he will proceed to state that if the experts having to deal with the quantities used or which should have been used, find a variance which in their judgment requires explanation, they make a report to that effect. Is that the idea, Mr. Brundage?

The Witness: Your statement is exactly correct, your Honor, except as to the last feature.

The Master: Yes.

The Witness: They would make no report, but the engineer of manufacture would want to know instanter what was the reason for an increase in the gallonage per thousand cubic feet of gas made.

The Master: In other words then, if as the result of the analysis of these various reports it appears that more oil has been used than experts believe should have been used, the matter is a subject of investigation by somebody?

The Witness: At once. And in answer to your further question, Judge——

Mr. O'Brien: (Interrupting.) I object to the voluntary statement of the witness.

The Witness: It is not a voluntary statement. He is asking two questions.

The Master: If it is not responsive to the question, I will strike it out.

Mr. Ransom: He is coming back to my question, and not to the Master's question.

Mr. O'Brien: He is pointing to you, telling you when to start.

The Master: Well, let Mr. Brundage get that off his chest and if it is not responsive I will strike it out.

The Witness: Counsel asked me as to two materials, oil and coal, and I was about to say that the coal is tested by the same method, a determination made as to the pounds of coal per thousand cubic feet of gas; which likewise

passes the scrutiny of the manufacturer, and will receive similar treatment if they were shown to be erroneous or believed by him to be higher than it should have been, or lower.

Mr. O'Brien: You are assuming the infallibility of all the underlying records, aren't you?

Mr. Ransom: I object to cross examination, your Honor.

The Master: I will let Mr. O'Brien ask the question, since it is asked, if he don't ask any more. He can answer that one question. In arriving at that conclusion, the experts assume the correctness, or, as Mr. O'Brien puts it, the infallibility of the records on which these results are based.

The Witness: I believe those records to be correct.

Mr. O'Brien: I did not ask you that.

The Master: Well, that is the assumption by which you do reach the conclusion as to whether too great or too small a percentage of oil and coil has been used in consumption. They assume the accuracy of the records as to the amount used?

The Witness: We verify the accuracy of the amount used by the method I have just described, your Honor.

Mr. O'Brien: That does not answer the question. Let me illustrate, Mr. Brundage.

The Master: Save this for your cross examination now.

Mr. O'Brien: Let me ask one question.

The Master: Just one.

Mr. O'Brien: You assume, for instance, to illustrate what I meant in my question, which you evaded, you assume that that octogenerian who weighs the coal in the 99th Street plant, is accurate in the statement he puts down in pencil on that paper as to the weight of the coal in the dump cars?

The Master: You need not answer that

question, and I will rule it out for two reasons, Mr. O'Brien; one that you have been characterizing this witness' testimony in a manner that I do not think is necessary, namely, as an evasion; and two, that you——

Mr. O'Brien: But, Your Honor, you can plainly see that he did not answer the question.

The Master: (Continuing) And two, that you have been talking about octogenerians in a plant that I do not know anything about. I will not allow the question. Next question.

Mr. O'Brien: Exception.

Q. In these tests with respect to coal used, you have available the data as to coal bought and paid for? A. We have.

Q. And as to the coal received and weighed? A. We have.

The Master: Of course, if somebody had the making of reports, and a lot of coal has been carted out and used by somebody else, the whole basis of the estimate falls?

The Witness: It is physically impossible for that to happen, Your Honor.

The Master: No, but that is the fact, isn't it? That would result?

The Witness: The periodic testing of your coal pile which is done by measuring the pile, would demonstrate that there had been a loss.

The Master: But assuming now this coal has been surreptiously used and not accounted for, and it has not been discovered on the check-up system that you have?

The Witness: Yes, sir.

The Master: Then the basis upon which the experts reach a conclusion as to the amount of oil and coal that is used, would be wrong?

The Witness: Yes.

The Master: That is what Mr. O'Brien was trying to get at. So that when they reach a conclusion as to the quantity of oil or coal used, whether it is in excess of or less than the aver-

age which should have been used, they are assuming the accuracy of other records?

The Witness: Yes.

Mr. Hayward: But that could not happen, because everybody connected with the company is infallible, from the lawyers down or up.

The Master: We have the statement on the record what Mr. O'Brien has in mind. If there had perhaps been an unusually large quantity of coal——

Mr. O'Brien (Interrupting): I think it is axiomatic. If they found a glaring discrepancy they will look it up and ask for an inquiry. They need not tell us that.

The Master: Let's get along to the next line.

Mr. O'Brien: Like Shakespeare's man, they protest too much.

Q. When Mr. O'Brien started his latest interruption, you were saying something about the inventory or check-up of coal. Did you finish your answer in that respect? A. If it was not perfectly clear on the record, I would like to say in addition to the checks that I have described, the engineer of maintenance makes a point to periodically measure all of the coal pile to determine that the coal carried in stock as shown by the books is actually in stock as shown by this measurement.

The Master: Does that come in the form of a report to the accounting department?

The Witness: It does not.

The Master: Do you see him do that?

The Witness: I do not.

The Master: Well then, I will strike out the answer" (pp. 1438-1446).

No one was called by complainant who received, weighed or used the coal or who received, measured or used the oil.

When the Master struck out Brundage's answer because the witness did not see the coal measured, it must

have been apparent to him that common-law evidence by one having personal knowledge was necessary. The Master took the books as the basis of how much oil and coal were used by complainant in the manufacture of gas. "Proof" of the amount of oil delivered was made by putting in evidence reports of produce exchange inspectors, of which Complainant's Exhibit 338 is a sample. None of these inspectors was called.

Another illustration of the "proof" regarded by the Master as satisfactory evidence of the accuracy of the books is typical.

> "Q. Is there any other Committee of the Board of Trustees than the Executive Committee that examined the accounts? A. Yes, we have a Committee of Accounts appointed from each Board of Trustees.
>
> Q. It is made up of members of that Board? A. It is (p. 1427).
>
> . . . . . .
>
> The Committee of Accounts meets monthly and there is presented to them all the original vouchers that have been paid during the preceding month and the Committee of Accounts confirm from an examination of the vouchers that every voucher has been approved by the Executive Committee and they check the vouchers so paid against the Company's cash book" (p. 1428).

There were two cash books admitted in evidence (Complainant's Exhibits Nos. 199 and 200; p. 1893).

The bookkeeper who made the entries therein was not called nor was any member of the Committee of Accounts called, nor was the failure to produce him explained.

The criticism just made of the admission in evidence of the cash books applies to all of the complainant's books that were received in evidence. The theory upon which

they are admitted was thus stated by the Master. (Italics ours.)

> "The Master: I am allowing it because I anticipate that Judge Ransom is going to take this position. This is a big organization, a big company, a regular course of business handling thousands and thousands of entries and many thousands of papers; that the books are correctly kept and they do not have to bring in witnesses to prove every single purchase or every single item of expense. *They can prove them by offering in evidence these books of account.* In order to do that I have got to give him the widest latitude to lay his foundation. When he offers his books of account in evidence, as I anticipate he will, I am going to permit counsel to cross examine this witness to destroy, if you can, the foundation that Judge Ransom is trying *so carefully to build up* • • •" (pp. 1448-9).

As we have elsewhere shown, the Master forgot his promise to permit cross examination (Point I).

The vice in the foregoing statement is the Master's assumption that the evidence adduced by complainant was sufficient to justify his conclusion that the particular books offered were correctly kept. Satisfied that that fact was established, everything else naturally followed, namely: the books offered were original books of entry; they were daily kept in the regular course of business; the business was a big one requiring "thousands and thousands of entries and many thousands of papers"; and as their genuineness and accuracy were proven, the burden was on the defendants to show that the data on which they were based and as to which it was unnecessary for the complainant to call any witnesses, were untrustworthy.

The books offered and received are not books of original entry. The testimony in support of the entries in said books was given by one who was shown to have

no knowledge of their contents. The clerks or other employees who have actual knowledge of the underlying data on which said books purport to be based were not called and no explanation was offered by complainant as to why they were not produced.

As a sample of Mr. Brundage's lack of knowledge of the transactions mentioned in the books, we give the following excerpt from his testimony on the preliminary cross examination by Mr. O'Brien:

> "Q. Mr. Brundage, I call your attention to the index (in Complainant's Exhibit 189, operating ledger 'A' of the Consolidated Gas Company for the year 1918); is that in your handwriting? A. It is not. * * * The bulk of that handwriting was made by Mr. Reynolds, one of the bookkeepers in the accounting department. * * * He is still with the Company (p. 1487).
>
> Q. The handwriting on the second page under the title 'Recapitulation' with numeral figures * * * is whose handwriting? A. I do not recognize it and am unable to identify it.
>
> Q. The same for page three? A. The same for page 33 (p. 1488).
>
> Q. I call your attention to page 25, and ask you in whose handwriting it is? A. I cannot identify it, sir.
>
> Q. This writing is, 'General Inspection Audubon Avenue Property,' is it not? A. No, it is not; * * * it says, 'General Suspense, Audubon Avenue Property'; and after that, '$55,725.'
>
> Q. Is there any Audubon Avenue properties in the list of properties identified by the witness, Alrich? A. I don't know (p. 1489).
>
> Q. I call your attention to page 26. * * * Do you recognize whose handwriting it is? A. I do not.
>
> Q. Do you recognize whose handwriting the word 'Assessments' opposite 'December' is? A. I do not (p. 1489).
>
> Q. I call your attention to page 28 of this book

and ask you whose handwriting it is? A. I cannot identify it (p. 1496).

Q. I call your attention to page 34 and ask you whose handwriting it is? A. I recognize the handwriting referring to entries during the months of May, June and July, as Mr. Reynolds', to whom I have referred. January and subsequent months I cannot identify.

Q. Do you know Mr. Devoe, the plumber? A. Only by reputation. I have seen his bills. * * * I don't know Sloan & Fuller.

Q. Have you ever done business with that firm? A. I could not say (p. 1497).

Q. Do you know Smith & Rosenfeld? * * * A. No, sir.

Q. Have you ever done business with them * * * on behalf of the complainant company? A. I could not say.

Q. Did you draw checks for any of the items on this page? A. I did not (p. 1500). * * * Part of the account on page 36, 'Automobiles and Accessories,' is in Mr. Reynolds' handwriting. The other part I cannot identify (p. 1500). * * * Page 51, 'Works and Station Structures,' the first entry * * * is not in Mr. Reynolds' handwriting. I do not know whose it is (p. 1501). * * *

There are various references made to payroll accounts; drafting suspense account; miscellaneous works expenses, F. and F.; that is not my signature or initials on this page. * * * I have not initialed any of these pages (p. 1502. * * *

I do not know the David Killock Company. I do not know what business they are in. * * *

I do not know the Sibley-Pitman Electric Corporation. * * *

I do not know the E. B. Latham Company (p. 1511).

I do not know in what business the latter two companies are in. * * *

I do not know the Harding Contracting Company, I do not know in what business they are engaged (p. 1512). * * *

I am unable to identify the handwriting on page 55, 'Construction 132nd Street Works and Station Structures' (p. 1513). * * *

I do not know in whose handwriting page 56 is, 'Kingsbridge Station Works and Station Structures Account.' I recognize the handwriting of entries during April, May and June, but not the others (p. 1513). * * *

I do not know the American Fence Construction Company or in what business they are engaged. I do not know where their office is located (pp. 1513-14).

The Master: Mr. O'Brien, I am going to ask you to declare the purpose of this examination.

Mr. O'Brien: The whole purpose of it is, that it shows first, that this is not a book of original entry and does not give us the original record of the outlay of money; secondly, it shows that the witness is not acquainted with the details of the book; that he does not recognize the handwriting; thirdly, it shows that there is no check mark of his to indicate that he has audited it; fourthly, it shows on its face an entire lack of any audit on the part of anybody else; fifthly, it indicates, so far as these accounts are concerned—these are capital accounts we have gone into so far—the reference made to expenditures which apparently are recorded in some other place and the records of which would have to be produced before you can offer this in evidence.

The Master: Haven't you developed those points sufficiently?

Mr. O'Brien: No, we have gone now largely to repair accounts. Of course, right here it is clear, too, that the books are erroneous because they are including in a capital account, ordinary expenses like painting and plumbing. There is a vital error. * * *

> The Master: I am not going to let you go through the four or five hundred pages of that book" (pp.1514-15).

We shall discuss presently the nature and character of the evidence which the authorities uniformly hold *must be adduced* before the books of "Big Business" may properly be admitted in evidence. For the present, it is sufficient to say that the cases agree that the books offered must be books of original entry, that the *one who made the entries therein* must be produced and testify to their accuracy, or his death or unavoidable absence established before secondary evidence of the entries made by him is permitted and that a sufficient amount of competent evidence of the underlying data—*i. e.*, the testimony of those possessing actual knowledge of the facts—must be adduced so as to give a "circumstantial guarantee" that as the books are shown to be correct for a selected limited period, they are accurate for the entire period covered thereby. These rules were flagrantly violated by the Master, who stated that he cared nothing about precedents or authority, and apparently acted on the assumption that he had the right to make his own rules.

> "The Master: I don't care about rules, I don't care about precedents (p. 2048).
>
> Mr. Chambers: Now, if your Honor please, you and I were put in the same category as saying something about precedents. What you and I, of course, had in mind, I think, is precedent, that is not in point. All of these cases which he cited——
>
> The Master: I will go further than that • • • and say that I won't be bound by any precedent with reference to the mode of proof and to the *quantum* of the proof; that if Judge Greenbaum directed the proof to come in one form or some other Judge directed it to come in some

other form that I don't feel bound by those precedents. I go a little further than you, but I have no hesitation in saying so" (p. 2071).

As the books were received for the purpose of showing the complainant's receipts and expenditures and as the Master's and Judge HAND's findings are based largely, if not entirely, upon what the books purport to show, it will readily be seen that the error committed by the Master in receiving them is substantial.

We quote sufficient from the record to show the purpose for which the books were offered and received.

> "Mr. Ransom: Your Honor, the complainant does not offer these books to prove the value of property. We offer them to prove the receipts and expenditures for the year 1918, not the value of property.
>
> The Master: Well, how about expenditures with reference to properties?
>
> Mr. Ransom: Well, expenditures for that year, of course (p. 1504).
>
> The Master: In other words, in offering these books you practically want me to disregard balances carried into the books?
>
> Mr. Ransom: So far as property is concerned, yes (p. 1504).
>
> The Master: As I understand Judge Ransom's attitude in offering this book, he offers it in so far as the Court may conclude that these entries were made in the usual course and are of some probative force.
>
> Mr. Ransom: We offer them to show transactions during the year 1918 (p. 1505).
>
> Mr. Ransom: This is the operating ledger and is offered only as such. Of course, one of the difficulties which I have anticipated in offering merely one book to present this issue, was the fact that, of course, many other things are shown in other books. Our offer is simply to show by the 1918 transactions, in so far as they have financial

aspects, that is, we show by the 1918 books, the 1918 expenditures * * * (p. 1505).

The Master: *I will never take a book that is copied from some other book. That I will not do.* The only basis for the rule that Judge Ransom is contending for is, entries made daily in the regular course of business from day to day, *not a transcript from some other book.* * * * Page 28 is *clearly a copy of entries* made in the regular course of business in other books. It is not in any sense a book of original entry, not even on the theory that you advanced, Judge Ransom * * * (p. 1506).

Mr. Ransom: Now, we felt that we have done the thing which carries it a step further, we are offering the books from which, under the precedents, the tabulations were originally made. * * *

Mr. Hayward: The broken link in Judge Ransom's chain, if the Master please, is that no tabulations from these books would ever be admissible, because these books that he has offered are not admissible. But tabulations from books of original entry might be admissible. In other words, this book is neither a tabulation of books of original entry, nor is it the book itself. Is my point clear on that?

The Master: Yes, it all turns on the point whether these books are books of original entry.

Mr. Hayward: Yes, and if they are not, then tabulations made from them are not admissible * * * (pp. 1541-2)."

We direct the Court's attention to the tabulations from said books which were admitted in evidence over defendants' objections and exceptions. It was upon these tabulations that the Master and Judge HAND very largely, if not entirely, based their findings.

The manner in which the tabulations were prepared was described by Arthur W. Teele, a certified public accountant (p. 1960), who, in the last week of December,

1918, was employed by the Consolidated Gas Company for the purpose of making such tabulations.

Mr. Teele testified:

> "Mr. Carter asked me if I was at liberty to take up an examination of the accounts of the Consolidated Gas Company and its affiliated companies and make such examination of their accounts and records as would satisfy me in regard to the integrity of their accounts and enable me to prepare such statements as might be necessary to show their revenues and expenses of the gas business, or such other statements as might be required in the conduct of the case which they were considering (pp. 1965-6).
>
> The first week in January (1919) I was in the office of the Consolidated Gas Company with one of my partners, W. H. Stumpfel, who was assisting me at that time. After going over the plan of accounting of the Consolidated Gas Company, the books kept, etc., I made plans for conducting an audit of their accounts, which in my opinion would satisfy me as to the integrity of the accounts kept upon their operating ledger, from which I prepared such statements as were necessary or were called for" (p. 1991).

Mr. Teele made no audit of complainant's books.

It seems unnecessary to observe that, so far as the admission in evidence of the tabulations is concerned, it makes no difference whether or not Mr. Teele was "satisfied" with the "integrity" of the company's accounts. We direct attention to the testimony, simply for the purpose of illustrating the nature of the evidence which appeared to the Master sufficient to justify the reception of the tabulations.

Continuing, Mr. Teele testified:

> "Q. Did you look at the original time books to check up the payrolls? A. We did this with regard to payrolls: *I had one of my assistants examine the*

procedure followed by the company in the preparation of payrolls and write out for me a complete description of the procedure followed in all of the departments, starting from the initial record made, and then we checked and verified the footings of all payrolls paid or made up and not paid at the end of the year and we tested the distribution of these payrolls by taking the individual time slips for two months during the year 1918, the month of January and the month of December, and making an independent computation of the distribution of labor as indicated on the individual cards, and comparing that with the distribution of labor as reported and shown by the payroll summary for the months of January and December. That examination covered the examination of something over ten thousand cards in the month of December and the same number in the month of January, 1918 (p. 2005).

Q. Can you describe just what you did with respect to the examination of other books, accounts and vouchers supporting the entries in the books which you have described; for example, with respect to material invoices and the like? A. Material invoices for the year 1918 are, of course, all listed in the approved invoice record, and those invoices were examined in connection with the verification of that record. They were examined again in compiling the necessary information to substantiate the distribution of the materials and supplies used by the company throughout the year. That is to say, with regard to the invoices for coal delivered to the company during the year, *we* took the individual coal invoices and set them down upon a sheet, showing the date of the invoice and from whom purchased and the tonnage billed and the tonnage reported as received and the amount of the invoice and calculated the total quantity—the total tonnage received by the company during the year 1918 and the total amount of coal to be accounted for by the company" (p. 2013).

It seems too plain for discussion, that if the books themselves were not properly authenticated, no tabulation from them is competent. Mr. Teele was not an employee of the company except, of course, for the special purpose for which he was retained. He had neither personal knowledge of any of the transactions the alleged record of which he examined, nor that kind of knowledge which comes to entrants who make entries in the course of their employment and in the regular course of the business. Mr. Teele simply examined a set of figures *prepared by someone else*, and of course could not testify to their genuineness or accuracy.

Notwithstanding the witness's conceded lack of knowledge, he was permitted to testify as though he personally was familiar with the transaction and therefore was entitled to give direct evidence of it.

> "Q. With reference to the delivery of coal, you did not compare or test any of the reports made, with the original delivery sheets at the plant? A. I did not. I cared nothing about it. I had proof of it.
>
> Mr. O'Brien: Just a minute. I move to strike that out.
>
> The Master: Strike it out (p. 2018).
>
> Q. What other method did you follow in proving or checking that, as approving the coal?
>
> Mr. O'Brien: I object to that. The question implies that there was one method tried for proving the coal and the witness says he did not prove it.
>
> A. *I took the manufacturing reports signed by the superintendent at the station, indorsed 'correct.'*
>
> Mr. Chambers: I object and move to strike that out.
>
> The Master; *I will let it stand.*

Mr. Chambers: It is not here. It is secondary and hearsay: * * * Your Honor is not going to take a tabulation unless they bring in the reports on which it is made?

The Master: I think I will (p. 2019).

Q. Will you state what was done, or what method was pursued with respect to the coal?

The Master: He said he took the report signed by the superintendent.

A. *Which report was indorsed 'correct' and signed* by the superintendent" (p. 2020).

The alleged report which was stated by the witness to have been indorsed "correct" by the superintendent, is part of the data upon which Mr. Teele's tabulations are based. The superintendent was not called, nor was any evidence of the report's genuineness or accuracy furnished by any witness. It seems idle to dignify Mr. Teele's utterly hearsay statement as evidence.

The excerpts which we now quote from the record clearly indicate that the Master acted upon an entirely erroneous conception of the law governing the admissibility of books of accounts and tabulations made from them:

"The Master: Does it (the company's system of keeping its books) tend to an accurate record of the company's business?

The Witness: It does.

The Master: And is it suitable to secure that?

Mr. O'Brien: That is back to the old objectionable ground.

The Master: That is allowed and exception to the defendants. Is it suitable for that purpose?

The Witness: Yes, sir.

Mr. Chambers: That was with an exception and objection, of course?

The Master: Yes (p. 2032).

Q. Have you made a sufficient examination and investigation of these books and underlying records to enable you to say whether, in your judgment, the accounts of the company are kept accurately?

Mr. Chambers: That is objected to as incompetent, irrelevant and immaterial.

The Master: Objection sustained" (p. 2032).

At the time the question just quoted was asked, it appears that the witness had not made such an examination of the company's books and records as satisfied the Master that the tabulations from such books should be received. The Master then indicated the character of the examination which the witness should make.

"The Master: * * * If you expect to prove by Mr. Teele these records as an accurate statement of what is contained in all of the supporting records, or you expect to prove a statement prepared by him from these books and all the supporting records, I won't take it unless Mr. Teele goes back to the very first items which support everything that he knows about * * * (p. 2033). I am going to insist upon Mr. Teele going back to the original time book and comparing that time book with some of the time sheets that came in, not all of them, but enough to make it clear upon the record that the probabilities are that they are all accurately kept.

Mr. Ransom: That is what he has already done.

The Master: He has not; he has not taken the time book and he has not taken the original delivery sheets (p. 2034). * * *

I believe that it is my duty to point out to you now that I think that these exhibits that I have received in evidence, more in the nature of tabulations they are, than original books of entry, although I think they are likewise, as I have already indicated * * * books of original entry in a

sense, I think *they ought to be supported by the testimony of Mr. Teele* that he has done all that he has testified he did and just a little bit more, namely, that he has checked the bills for goods charged with the contemporaneous records made at the time, showing that they came in, and further that he has checked the time cards certified by the superintendent sufficiently to make *sure that the superintendent's O. K. is to be relied upon with the time book itself, then you have a complete record* (pp. 2036-7). * * *

I believe, too, that if Mr. Teele goes into the books of the other companies, *he will be able to testify that he found they had expended a certain amount of money for construction during the year,* justifying the apportionment of superintendence. I think I am entitled to have that * * * (p. 2049).

I want Mr. Teele to say * * * that he having checked those sheets furnished to the general office with original entries in the time books and with the delivery sheets and with the cost of construction *as appearing from the books of the other companies, that they are correct. I am going to take his proof and I think I should be fairly well satisfied without much doubt in my mind that these books are correct* (p. 2050).

I want Mr. Teele to be able to testify by an actual comparison between the time books and the time sheets, *to such an extent as will justify his conclusion of fact or opinion* (p. 2053).

Mr. Ransom: Who is to be the judge of that?

The Master: *I am.* * * * Mr. Teele has indicated that the better way would be to take a month in one of the plants. Now, I am inclined to think that any one month would sufficiently test *the accuracy of the records* back to the time books and the original delivery sheet (p. 2054). * * *

The Witness: I would suggest that we take the month of December, where we have partially checked this, where we have *verified* a distribution of that payroll.

The Master: Unless there is some other sug-

gestion I will suggest that the witness verify the record for December * * * of 1918 (p. 2054). * * *

I think that Mr. Teele *ought to satisfy himself* that the reports made by other companies to this company as to the amount of work done *was accurately* reported, *so that he can say* that the apportionment (of superintendence and engineering) *was made correctly* (p. 2055). * * *

Mr. Chambers: * * * are not the defendants entitled to have called here, as to how much coal they use in a certain plant, for cross examination, the superintendent and those who know how much coal came in, so that we may ask them if they were working for the Standard, or the Mutual or the Consolidated, and whether that gas was made for the Standard, the Mutual or the Consolidated.

Are not we entitled in this case to have these superintendents called, because of the fact that these companies are all mixed up? Now, it may be that at one of these plants the Consolidated Company received so many gallons of oil, and it may be, if we have the opportunity to examine the superintendent, that some of that oil and some of that coal, although charged to the Consolidated Company on their books, was used for the Standard. It may be that it was used by that coke company. They are all mixed up. Now, because this is a holding company and affiliated with all these other companies, I say that we are entitled to have these men called for cross examination" (p. 2056). * * *

No reply was made by the Master to the very pertinent questions addressed to him by Mr. Chambers.

"The Master: I will let the witness take his own month and conduct his test as to the accuracy of these records, *and after he has exhausted the information available* * * * I shall take his testimony (p. 2065). * * *

All I want is to be satisfied *by competent proof of an expert* * * * that these records are correct (p. 2066). * * *

I have agreed with Judge Ransom that when he proves a complete accounting system in a big enterprise, and he proves that the Public Service Commission have required certain accounts to be kept, and he proves that they have a completely organized accounting system from step to step, with the usual checks that obtain in a business enterprise like this, and he proves that an expert like Mr. Teele has gone into these records and *has tested them here, there and in other parts,* and has tested them to the point of going back to the original source of records kept in the usual course of business, and he starts in and he checks up his time book with his time sheets either for months, or here and there at different months, or in several plants, or in one plant, that the result of that examination leads me to the thought that I think is justified by the authorities * * * that these books *may be received in evidence without calling all these witnesses and without calling into court these original records* (pp. 2073-4). * * *

Mr. Clark: That is not our contention, but we contend that these tabulations should be made up from the *original documents and should not be made up from transcripts from them, because no transcription of those original documents is of any more value than the original document. Unless you prove that your original document is worthy of belief, you have not proved any of these books.*

The Master: In that respect I do not follow you and do not sustain you. * * * I think that * * * taking any ordinary business or enterprise which shows the goods were received and that goods went out, that money was paid, or money came in, that time was spent, time sheets and time records upon which they pay out their money, generally speaking, ninety-nine and a fraction times out of a hundred are correct. * * *

Mr. Clark: The fact that Mr. De Castro at one plant is a good bookkeeper, does not prove that anybody at the 21st Street plant is a good bookkeeper.

The Master: No, but having as a basis that the 99th Street plant or 42nd Street or any other plant as testified, *checked up correctly*, having in mind the general course of this business and all the safeguards that must be thrown around it in order not to have the company lose its funds and its assets by theft or otherwise, * * * I think the time has come when some weight and a good deal of force must be given to records kept in that way.

Mr. O'Brien: If you press that so far, you are going to have a case made up without any witness under oath *as to the facts.*

The Master: No.

Mr. O'Brien: *The books are not sworn testimony*" (pp. 2074-6) * * *.

As we have shown elsewhere, the Master would not permit defendants' counsel to cross examine Teele for the purpose of ascertaining whether or not he had made the specific tests which the Master directed (Point I).

Mr. Teele was finally permitted to testify:

"Q. Are you prepared to say now that you and your assistants under your direction have analyzed the ledgers and journals and the other books back to every original item in the sense that you have taken *some of the original records here and there for the purpose of determining whether the books have been accurately kept?* A. Yes (p. 2152).

Q. So that in your opinion as an expert accountant the books received in evidence are substantially correct?

Mr. O'Brien: Your Honor, permit me to record an objection, with due deference to your Honor, to the question and the line of questioning that has been indulged in.

The Master: Yes, overruled, with exception.

A. *That is my opinion. They are correct"* (p. 2153).

If the Master's notion of the law be correct, all that is necessary to be done to secure the admission in evidence of books of account, is to produce them and have an expert accountant testify that he has examined and found them to be correct. The answer to this extremely dangerous rule of evidence is obvious. Books of account may be so carefully kept as to be mathematically accurate, and yet the transactions therein recorded may not be truthfully stated. If the rule announced by the Master be upheld, it will be a shield for dishonesty and an invitation to depravity. What protection against corruption can there be when the right to cross examine those who have personal knowledge of disputed transactions is denied because an "expert" has examined them and found them to be correct? It is no answer to this question to say that the defendants' accountants were given opportunity to examine the books and satisfy themselves of their accuracy. All that the defendants' accountants might be able to detect were mathematical and clerical errors. They could not "go behind the returns" and as they have no personal knowledge of the original sources of information, their examination could be of no practical value so far as the demonstration of the real situation is concerned.

There is another unfortunate result which is bound to ensue from the adoption of the Master's rule and it is so destructive of the law maintained in confiscatory cases, that we confidently submit this Court should not uphold it. In all such cases the courts have uniformly held complainants to the same rigid rule of evidence as that imposed upon prosecutors in criminal

actions, to wit, they must establish their cases beyond reasonable doubt.

Des Moines Gas Company v. *Des Moines*, 238 U. S., 153, 163;
City of Knoxville v. *Knoxville Water Company*, 212 U. S., 1, p. 8;
Ex Parte Young, 209 U. S., 123;
San Diego Land Company v. *National City*, 174 U. S., 739, 754.

Complainant comes into Court with a set of books, prepared perhaps with a view of proving that a fair return upon its invested capital cannot be earned on the rate of which complaint is made. According to all of the authorities on this subject, it must establish its case by competent evidence beyond reasonable doubt. It produces its books; it does not call any of its employees who presumably have personal knowledge of the underlying data upon which its books of account are based, or even intimate that they are dead or unavoidably absent; instead, it puts on a witness who testifies that he is able to identify the books as reproductions of other books or records, and adds to this the testimony of an "expert" who blandly informs the Court that he has made such an examination of the books as "satisfies" him of their "integrity and accuracy."

The defendants call for the production of the superintendent who made up the complainant's time sheets. The Court replies to this request by the statement that as the expert has examined the superintendent's time sheet and found it endorsed "correct" there is no necessity to call the superintendent.

It is respectfully submitted that the procedure followed in the instant case should be disapproved by this Court as an unwarrantable and unjustifiable attempt to

shift to defendants the burden which belongs to complainant.

If the rule announced by the Master and upheld by Judge LEARNED HAND be sustained, the result must follow that a public utility may nullify a rate statute simply by putting in evidence its books of account. Such a conclusion is so utterly repugnant to certain time-honored and well-established rules of evidence that we are confident this Court will not approve it.

It is still the law that before secondary evidence will be permitted there must be satisfacory proof that the best evidence of which the case is susceptible cannot be adduced. In the instant case this salutary rule was violated under circumstances which no plea of *alleged* overwhelming necessity can excuse. The books, which are reproductions of original entries, were received without any other evidence of the accuracy of their contents than the hearsay testimony of Brundage and Teele.

According to Judge HAND these books "have a public character derived from the supervision which can be and is exercised over them. * * * The State having so much hand in their creation and such continuous power of examining them, should not be entitled to demand a verification first-hand of *every item* by common law proof before they become *prima facie* competent." (Italics ours.)

In the instant case the defendants did not demand verification first hand *of every item*. They did insist that as to some essentials, the figures in the books be explained by some one who has personal knowledge of the facts.

The examination of these witnesses would not have taken as much time as the defendants were compelled to consume in the cross examination of Brundage and Teele. Brundage probably knew a great deal more about the company's transactions than he was willing to tell. Teele necessarily devoted considerable time explaining those bases of his tabulations which depend upon conversations

between himself and complainant's officers, engineers, and other employees.

On the trial the Master asked counsel for the defendant Swann the question:

> "Mr. O'Brien, you were going to explain to the Court how we can avoid bringing all the records and vouchers and statements without taking these books in evidence" (Rec., pp. 1778-9).

We quote sufficient of the discussion which ensued, to show the procedure the defendants properly insisted should have been followed by complainant, in establishing its case:

> Mr. O'Brien: Let me start with the simple things and lead up. Take the works at 99th Street, where they make some gas. * * * The three great factors are coal, gas oil and labor.
>
> There are three or four machines there, two of them running we will say, and the coal is brought in from the barge. The old gentleman weighs it and notes the weight of the dump cart, and it proceeds across a trestle, over into the generator house. There is a record kept of the loads he brings in, the man operating the gas machines, Barrier or some of his colleagues there will run the machine from one day to another and note the amount of oil used. He transcribes the record from the gas oil meter. Someone else is charged with the duty from time to time, I assume, of going out into the tanks and measuring it in another way with a yardstick.
>
> So they keep tabs from day to day of the amount of gas oil used, and they ought to be able to say at the end of the year how much oil has been used in that works. The amount of work done in the machine shop or in the yard, in the meter house and so on, is brought in, and it is a very simple record. There is one clerk in the works' office who is keeping tabs on that, and he transcribes some of

these records into a manufacturing book, and that, as I said before, is the quintessence of information from the doings at the works, the operating results and the detail of the operating works.

We have not had them offered in evidence. One manufacturing book is built up out of these records, and usually it covers a time of three or four or five years. So the one book brought in with the clerk of the works, would bring in these records; they would be identified by him; in some instances to show the system or present certain tests of the records, to show the reliability of the records, the original record, that could be done.

The only other case in which they are making gas in the city—that is the complainant company directly—is at 21st Street, and that could be done the same way there. What I am driving at, your Honor, is that so far as the method of proof is concerned and the time to be taken in presenting the proof is concerned, it does not make any difference whether the company is as big as the Consolidated or strong as the struggling little weakling in the corporation line, the Bronx Gas & Electric in the eastern section of The Bronx. The method is the same.

In other words, the amount of gas, when you get beyond a certain quantity of business, does not mean a proportionate amount of work in bringing the witnesses in. * * *

The Master: What was it you told me Judge GREENBAUM (in Kings County Lighting Co. v. Lewis, 110 Misc., 204), did?

Mr. O'Brien: When this matter came up before Judge GREENBAUM we went all over this law and it was well argued. He said they would have, of course, before presenting books, to produce the original records. They said, 'Your Honor, it will take van loads of things to prove the case if that is going to be insisted upon.' Well, it was insisted upon and they said there is countless work tickets, pink tickets and green slips, and so on, for the different kinds of work done, and they said if they

were asked to do that this courtroom would not hold the stuff. I went personally on a little visit out there to the plant, to see how the investigators were getting on, and I asked for certain kinds of records which covered this form of evidence which they said would take van loads and they were all done up in twelve little packages, your Honor.

The Master: What I want to know is this: Were books similar to these offered in the Greenbaum case?

Mr. O'Brien: They were.

The Master: They brought up that question?

Mr. O'Brien: They were. The first book that brought it up, your Honor, was the manufacturing book. That is, it shows the quantity of oil and coal used and the labor.

The Master: That is like this manufacturing book A, was it?

Mr. O'Brien: No, it was not. It was a book kept at the works which showed the daily make, the corrected make, the amount of gas oil used, the various kinds of coal used, the amount of water used, then the labor and the number of men employed.

The Master: Then I understand that. That was offered in evidence without the production of all of these supporting data.

Mr. O'Brien: Yes.

The Master: What did Judge GREENBAUM do with the offer?

Mr. O'Brien: Why, on objection being made, he declined to receive the book and he said they would have to produce the underlying data.

The Master: That was the book kept at the works?

Mr. O'Brien: The book kept at the works.

The Master: And although that was the only book kept at the works which would contain all the information at the works, he would not let it in?

Mr. O'Brien: Yes.

The Master: Then what happened?

Mr. O'Brien: Here is what happened. They

had a clerk who had been with the company or in its employ for a number of years. There was a witness called to explain and identify the book. Objection was made to it and counsel said he was only explaining the book just to show the method, and the Judge of course put in the record a provision that the questions were not to carry with them the idea that the book was going in. Well, objection being made, the company produced the records that were made, gas makers' reports, daily reports and weekly reports. The gas makers' reports were produced and they show statistical data from day to day, each run, as it is called, on the machine, the amount of oil used, and the amount of coal used.

The Master: That was part of the information that was in this book?

Mr. O'Brien: Yes, copied into the book.

The Master: Yes.

Mr. O'Brien: Of course, the works clerk does some computation.

The Master: Then Judge Greenbaum made them bring a witness to testify to the accuracy of some of these sheets?

Mr. O'Brien: The accuracy of the sheets, and then his computation. There was a matter in which he made certain computations. It was found, for instance, that when he noted the amount of coal of a certain kind that was used, on analysis he worked in each day in his computation a certain coefficient of so many pounds of coal per thousand feet of gas made. That coefficient was brought into the accounting or the computation to cover possible wastage and leakage, and they tried to justify it by saying that it was made to cover the variations between the pile and the survey at the end of the year, and the computations made from the bills showing the delivery of coal.

[The foregoing emphasizes the demand made by defendants that the person or persons who made the coal inventories be produced. As the record shows, the object of the

inventory was to show if there were any variations between the amount of coal reported received and the amount reported used.]

However, these little records were presented and the witness cross examined upon them. The computations were shown. These little things were brought out: The method of transcribing the amount of gas oil used and the record of keeping the measurements of the tank. They all came into it, and they had the result in that particular case, your Honor, of Judge Greenbaum positively excluding that book from evidence except as to the oil used. He was satisfied as to the way in which the oil account was kept, but he said that the testimony showed it was absolutely unreliable as to the other features, and it was eliminated from the case.

After the accountancy end of the case, that came up in this way: Witnesses were called, with the ledger and the journal, and they turned, as did our witness here when I undertook to cross examine him, to the first account in the book, and it happened to be a stock account of coal. It not only disclosed that, but they were adding to the invoice account the cost of labor and so on, and striking an average book cost for coal.

As we went along in that three or four days trying to find out the way the books were kept before they were offered, the result of it was that the Court insisted that he would have to prove it, and the result of it was that the Court insisted that he would have proof of the expenses of the company from original sources. He said, 'You know how much you paid for coal, how much you paid for oil and how much you paid for labor,' and they were compelled to bring in and put in evidence their vouchers, showing the amount of coal and oil purchased and the payrolls were brought in and the time tickets where they had them were offered in evidence, and then certain months or weeks were taken in order to test the

accuracy of the record, by cross examining the man who was present and who made the record, or who was present at the time it was made.

The Master: What was the result after that test? Then the books went in?

Mr. O'Brien: No, the account books or books of account were never put in evidence, except as to certain features they were offered in evidence near the close of the case. In other words, the Court said, 'You can go directly to the sources of information, the vouchers themselves,' and from those vouchers showing the payment of money were made up schedules, the vouchers were listed, and then there were certain allocations made to various columns for the certain kinds of expense. They were made up from the original sources of information, and they were received after a minute cross examination preliminary to the objections that were made to their being received.

In this case, your Honor, there is more than a special reason for the objection; for here we have not even the books that were made contemporaneously with the transactions; we have not here the books of the branch offices out of which reports are made to the central offices.

The Master: Those books at the branch office and at the works are not made contemporaneously with the transaction. They are taken from others.

Mr. O'Brien: I suppose they record them the day after. They make a record in the clerk's office at the works.

The Master: I do not think that the works' books which contain entries taken from other sheets and records and vouchers are any better than these books.

Mr. Chambers: We have the right to cross examine the man who made them.

Mr. O'Brien: What I want to say, your Honor, is that these are more objectionable. They are more objectionable because they have gone through many cases, they have gone through further computation, they have been copied and then ana-

lyzed as in the journal and divided up and then to their final resting place, the ledger of the company. * * *

Mr. O'Brien: Now, let me proceed to further show your Honor just the error we are falling into if these books are allowed in. The accuracy of these books has not been proven, the accuracy of these books cannot be accepted on the statement of a witness that they had a system; and the accuracy even on a cursory examination, has shown to be very much in doubt. Turn to the restaurant account—I am talking now from a very hasty and cursory examination that I made—and I don't know very much about accounting—they have a long account there covering the restaurant and kitchen supplies that are bought. A great many of the checks in the Treasurer's office are for that and for similar extraneous matters which do not relate to the gas-making business.

The Master: Mr. O'Brien, let me interrupt. I think I have reached a conclusion which I will express, without saying that it is definite.

Mr. O'Brien: Well, I have a number of little objections that I will have to place on the record before you——

The Master: I am not deciding it. The thought occurs to me, and I want to see how this will work. Judge Ransom, I do not believe it is going to be such tremendous and difficult job for you to produce in Court the books, vouchers and records upon which these accounts depend, and have them identified by Mr. Brundage as the regular reports, documents, and vouchers" (pp. 1778-1793).

The Master subsequently ruled that he would not compel complainant to bring the vouchers into Court. He directed the defendant to go to complainant's office and examine them there.

"Mr. O'Brien: * * * You can go up and go through the 99th Street works, they make only a little gas there. Now, the pay roll account could

readily be verified. They have perhaps some employees that have been with them some time, the clerk up there at the present moment happens to be new in their employ, he has not been long with the company, but Mr. De Castro has been there a long time, he grew up with the gas company; Mr. Kellogg at 42nd Street, 29 years with the company, knows it backwards and forwards, knows every little detail about the plant as they used to run it, and there isn't anything that he needs to talk about except possibly a few little unimportant records of that place. Now, the superintendent for the 21st Street plant can do the same thing, he could walk into the little office there, they haven't a lot of clerks working, they have a couple of old time employees going over the records that come in from time to time, and when they say we have got to offer these in evidence and produce the witnesses, it does not mean that every single one of the hundred or more employees from the works have got to be catechised in detail as to all of these records. Their reliability has got to be established, however, by bringing these men in.

Now, as to the books of account in the main office, or the branch offices, you take some man like Mr. Fenniman, formerly in charge of the Washington Heights branch, now employed in some other branch, well trained in the business, knows it from A to Z, you could ask him and from memory almost he could give you these little matters, and thus establish the same as the records the manner in which they keep track of the meters, the consumers' meters. And so you can go through with the engineering end of it during the year 1918.

I assume it is a very small matter, such as the little changes as they made in connection with production of toluol, so I assume that, knowing that during the period 1917 and 1918, when material was very high, that the gas company would not indulge in doing work that might be deferred until some later period, so that there would not be so

much of that. Your Honor, they have got to, even outside of the objections that would ordinarily lie, you have in these operating ledgers, you have so many accounts that have got to be analyzed, so many accounts that have got to be brought in here and justified as being part of the gas-making business, that we will fall into grievous error if these books are admitted.

Now, in regard to the pay rolls, the same thing may be said, your Honor. We are not going to ask for millions of tickets that we may go over them and ask the pay clerk or the time clerk in every case how he did, but they must be produced and offered in evidence. The man who kept the time and looked after that feature of the work must be put upon the stand, and we should have a reasonable opportunity to cross examine him as to the way in which they conducted that business. * * *

Mr. O'Brien: The plant at 42nd street has a couple of old watchmen and this old employee, Mr. Callogg. At the other stations likewise, there are few employees. I counted up the number of men at the 99th street station, and I suppose there were 35 or 40 people employed there. Going to the holder station at 111th street, half a dozen would cover the employees. Going to the tunnel at 132nd street there are perhaps two men employed there, one days and one nights. Going up to the Fordham station while there are a number of men now painting the holder in the station house, perhaps a half a dozen employees would cover it all. So, on the question of labor, this thing is not so colossal.

The Master: I will hear Mr. Chambers.

Mr. O'Brien: Will you let me give you the further reasons? I started to mention some. I mentioned the fact that a number of accounts are included that are not justified, and so far as we can see, they are extraneous to the gas-making business. The fact that many of the accounts are not complete; the fact that they have not even shown here an audit of the accounts. The wit-

ness did not seem to know but very little, and only in a general way, about the accounts that were kept, the fact that comparatively that few men work on the books shows that there is not such a large number of men to be brought in here to be examined in connection with the books of original entry. The fact of the economy and efficiency of the making of gas in the year 1918 has not yet been established, and that the expenditure of money involved in the item shown in these books is still unknown to your Honor. Nothing is shown. * * * We do not know that they actually received this gas, except the statement of the witness, that no check was drawn until some paper came along with a number of signatures on it of employees and such presumption as might arise out of that fact. The fact that the coal and oil contracts have not been proven. The fact that the expenditure of money in that direction has not been properly established. There is no testimony before your Honor——

The Master: I do not believe that Judge Ransom expects me to assume that the charges made here and prices paid for coal were reasonable until he proves it.

Mr. Ransom: Of course, we are going to prove all of these things, as I have repeatedly said" (pp. 1808-1820).

Complainant's counsel did not keep his word.

Defendants did not demand that all of the vouchers be produced. All they asked was that those who made them up or who knew the facts on which the vouchers are based be produced for cross examination on at least one or two vouchers a month so as to arrive at some basis of testing their accuracy (Rec., p. 1838).

Many of the vouchers fail to disclose the facts.

The Master's disposition of the underlying vouchers is confusing. He made several contradictory statements on the subject.

"The Master: I have just explained that when I received these books in evidence, I received in evidence practically all of the supporting vouchers because they are all at your disposal. My attitude is that every voucher, every bill, every record, every paper, every report which is reflected in these books is in this record" (p. 3751).

"The Master: If those vouchers are in evidence.

Mr. Ransom: I thought you had ruled that they are.

The Master: I have refrained from ruling that they are in evidence. I have said they are in the record. I draw a distinction between saying they are in the record and being in evidence" (p. 3855).

"The Master: In that connection I want to say, and in answer to Mr. Chambers, that in my opinion all of the supporting vouchers in the files of the Consolidated Gas Company having any relation or reference to any of the entries in the books of account accessible to these defendants, are as much in evidence as though they have been offered here and marked in evidence" (p. 3865).

The Master also stated that he took the books as proof of every item recorded therein and he would not call "individual witnesses to prove individual facts." His reluctance to devote any time to the examination of the records on which the books purport to be based was apparently because of the statement of complainant's counsel that his client was losing many thousands of dollars a day (Rec., pp. 6756, 6769, 6780).

In the instant case, Judge HAND held:

"* * * The defendants objected to the reception of all these books on the ground that they were not properly proved. Probably the proof was inadequate, even under the present-day laxer rules, had they been used in an ordinary case, as, for example, to prove transactions recorded in them on which obligations of a third person depended. The case is not such. This is a suit between the

authorities of a State and a company long since recognized as performing a public service and under the regulation of the State. Article Four of the Public Service Commissions Law of New York puts the entire conduct of such companies as the plaintiff minutely within the regulation of the Public Service Commission. Section Sixty-six gives the Commission general supervision over all such, power to investigate the quality of their services and to fix its character, to prescribe the form of the records and books it shall keep, to examine its officers and those records, to keep informed as to its doings and property, to require a detailed annual report including its receipts and expenses and any other important facts it may wish, to enter upon its property and examine its books and vouchers, to compel the production of any such, to subpoena its officers, and to compel it to keep its account of separate businesses separately. Books kept in accordance with orders lawfully promulgated by the commission under such powers are on a different footing in a suit based upon the action of the State and against its officers, from even the same books if attempted to be used elsewhere. They have a public character derived from the supervision which can be and is exercised over them. The authorities are not, of course, bound by them in any event, but, prepared as they are, under their direct and constant supervision, they can scarcely be put in the category of the usual *ex parte* entries about whose admission the cases are concerned. The State having had so much hand in their creation and such continuous power of examining them, should not be entitled to demand a verification first-hand of every item by common law proof, before they become *prima facie* competent. The guaranty of their truth is sufficiently established by the scrutiny to which they are always subject, and the penalties which follow upon a disregard of the Commission's orders (Section Seventy-three). It would indeed be an incredible burden to require every item to be separately established and even these defendants have

not gone so far as that. But if these proofs are not *prima facie* competent they might call for such proof, nor can I reject them without putting the company upon their mercy.

Documents prepared in an analogous fashion came before the court in *Rowland* v. *St. Louis, etc., Co.*, 244 U. S., 106, 108, and *Northern Pac. Ry.* v. *Keyes*, 91 Fed. R., 47, 58. In each the court received them, though prepared in disregard of the strict rules of the common-law, because of the opportunity afforded the authorities to check their accuracy by a recourse to the original records and if necessary to the entrants who actually made them. In neither case did it appear that the company was under such stringent supervision as has been established in New York. Here, as in *Rowland* v. *St. Louis, etc., Co., supra*, it may be said that the company 'exhibited its work-sheets and data to the (defendants), that the returns were made by the employees in the course of their business, and that if the (defendants) had desired to question any of the data they could have called for further verification.'

Nor, indeed, were these books admitted until Teele had made a thorough checking of all the items by their vouchers for the period of a month or more, submitting them in this way to an honest test of their accuracy. The 'purely negative attitude' of the defendants is not consonant with that desire 'not to seek an unjust advantage from the difficulties of stating the company's case,' which we are told must be imputed to a State in such affairs, *Rowland* v. *St. Louis, etc., Co., supra*" (Rec., pp. 149-a-151-a).

There are several features of Judge HAND's opinion which require careful scrutiny.

(1) "Probably the proof was inadequate, even under the present-day laxer rules, had they been used in the ordinary case, as, for example, to prove transactions recorded in them *on which obligations of a third person depended.*"

In the instant case, the books do record or purport to record, transactions on which obligations of third persons depend. They purport to show what it cost complainant to manufacture and distribute gas and it is upon the entries of that cost that the obligations of third persons—complainant's consumers—depend. It is no answer to say that the rights of these third persons are protected by the requirement that complainant's books be kept in compliance with the Uniform System of Accounts prescribed by the Public Service Commission. The Uniform System of Accounts simply requires a classification of accounts; that is to say, the entries of certain items under particular headings. The system may have been designed—as Judge HOUGH in a case following Judge HAND's decision held—to give the ordinary layman illuminating and convincing information that the cost of his gas is honestly and accurately recorded in the gas maker's books. As we shall show presently, complainant's chief bookkeeper was compelled to admit that he could not tell from books kept under his supervision for a long period of years, what certain accounts therein mean. He testified that in some instances it would take a gas engineer possessing adequate technical knowledge to explain them. Complainant's expert accountant Teele was compelled to resort to some of the company's officers, engineers and other employees for the elucidation of certain important items. As we have shown elsewhere (Point I), many of the vouchers upon which the book entries depend have been destroyed, so that there is no way now by which satisfactory evidence can be adduced as to whether or not the sums those vouchers were alleged to represent are properly chargeable to the business of making and distributing gas.

(2) "Article Four of the Public Service Commissions Law *puts the entire conduct of such companies as the plaintiff minutely within the regulation of the Public Service Commission.*"

There is respectable authority for the statement that Judge HAND is mistaken. As was held in *People ex rel., New York Railways Co.* v. *Public Service Commission*, 223 N. Y., 378, "*The object of the statute is not to regulate the management of their finances*, but to show what the management was." It cannot, therefore, be fairly claimed that "*the entire conduct* of such companies as the plaintiff is minutely within the regulation of the Public Service Commission."

> (3) "The guaranty of their truth is sufficiently established by the scrutiny to which they are always subject and the penalties which follow upon a disregard of the commission's orders (Section Seventy-three)."

The Public Service Commissions Law will be searched in vain for any provision which imposes a penalty or penalties for false entries wilfully made in the books of a public utility kept under its supervision.

> (4) "But if the books are not *prima facie* competent they (defendants) might call for such proof, nor can I reject them *without putting the company upon their mercy.*"

We are unable to understand what seems to be the implication in this part of the learned judge's opinion. Enough has been said in other parts of this brief to demonstrate that the complainant, with the active and eager assistance of the Master, easily put the defendants at its mercy. The quality of that mercy was certainly not unstrained.

> (5) "* * * If the defendants had desired to question any of the data they could have called for further verification."

The defendants did call for further verification but they were met by the Master's invariable command to

"go to the gas company's office" or to confer with Teele or his assistants and after conference with him or them, return to court and confine their cross examination to such items as they were able to show were *mathematically incorrect*. Access to original sources of information, *i. e.*, the men who measured the oil or weighed the coal, was denied.

A fair illustration of what might have developed, had defendants been given the opportunity to examine complainant's plant superintendent, is shown by the 99th Street manufacturing book which was brought before the Master, not voluntarily by complainant, but under subpoena served by defendants. The book had been mutilated, changed and altered and the alterations were not explained.

Herbert C. Davidson, one of complainant's employees in its accounting department, was called by defendants and testified:

> "Q. Mr. Davidson, are you quite sure that this is the original book from the manufacturing station? A. I don't know which book you have there, but I am sure that the two books I brought——
>
> Q. I have this one here that is broken. A. I am sure that is the book from the manufacturing station.
>
> Q. And you are sure that this is the book that was produced in court? A. Yes.
>
> Q. Is there any other book a copy of this anywhere that you know of? A. Do you mean beyond the station copy?
>
> Q. Yes, sir. A. None other to my knowledge.
>
> Q. Is there anywhere that you know of any other copy of this, what you call the office copy?
>
> The Master: General office copy.
>
> A. No, no copy of either, so far as I know.
>
> Mr. O'Brien: I offer in evidence detail record of manufacture of the 99th Street station,

so much of it as appears in the month of May, 1919, under the columns on the left-hand page embraced within the general heading, 'Manufacturing Averages.'

Mr. Ransom: That is from the general office copy.

Mr. O'Brien: 'Manufacturing Averages,' that is the first general column; 'Water,' the second; 'Oil Account,' the third. I offer those three general columns: 'Manufacturing Averages,' 'Water' and 'Oil Account.'

Mr. Ransom: I object unless the entire document is received.

The Master: I will receive so much of it as Mr. O'Brien wants to offer. Mark the book on the flyleaf, and the record will show the part of the book that Mr. O'Brien has offered.

Mr. Ransom: It appears that he is offering from the general office record.

The Master: Yes, that is all right.

Mr. O'Brien: I now offer in evidence so much of the detail record of manufacturing book of the 99th Street station for the month of May, 1919, as is embraced on the left-hand page for that month under the columns, the individual columns under the general heading, 'Manufacturing Averages,' 'Water,' 'Oil Account.'

Flyleaf of book marked Defendants' Exhibit AA-444.

Mr. Ransom: I object to the offer on the ground that your Honor very clearly and specifically indicated at the time Mr. O'Brien had this book in court, and used it in his lengthy cross examination of the witness Woods, that you considered it in evidence, and that when I made a specific offer of it in evidence, your Honor indicated that you regarded it as already in.

The Master: The book will be marked. I take it that what you are calling attention to now are the corresponding items in the origi-

nal book of manufacture of the general office copy.

Mr. O'Brien: Yes.

The Master: Mark the flyleaf of the original.

Flyleaf of book marked Defendant's Exhibit AA-445.

The Master: Now, Mr. O'Brien, I ask you to state in what respect they differ, and the purpose of your offer.

Mr. O'Brien: I have made a statement several times to your Honor which I promised to substantiate as to the differences between the books that were turned over and the books that were really the actual books.

The Master: No, you say these two books differ, do you?

Mr. O'Brien: I do.

The Master: Just tell me how they differ.

Mr. Ransom: I object to this. The record clearly shows the way in which this so-called general office copy is made, the way in which it is in the first instance made up, and in the second instance the way it is checked up during the following months.

The Master: I want Mr. O'Brien to state what his claim is.

Mr. O'Brien: The first column here in the original record, that is the works book, under the column 'Oil,' we have 3.97; in the office copy we have that same number and a line drawn through it, and over it 3.80.

The next line, 3.94, we have in the works copy; in the office copy we have the same number scratched and over it is written 3.73.

For the third day of the month we have 3.85 in the works copy; in the office copy we have 3.85 with a line drawn through it, and over it 3.65.

Next we have 3.96 in the works book; in the office copy 3.96 scratched out and over it, 3.74.

The Master: You need not read any more. I see your point.

Mr. O'Brien: And so on, the numbers ranging down to 3.57.

The Master: Are there any other columns in which there are changes?

Mr. O'Brien: Yes.

The Master: In what other columns are there changes?

Mr. O'Brien: In the works copy under the title, 'Gas Oil,' the subdivision under the general account, oil account, we have the total number of gallons given in red ink as 482,640. That has pencil lines drawn through it, and over it is written 220,190.

In the office copy all of the columns, all of the first four columns under oil account have a red line drawn through them. In the original book, that is the works book, there are no entries made under the last three columns of the general column 'Oil Account,' which are entitled 'Gallons Received,' 'Gallons Used,' 'Gallons on Hand,' yet in the office copy under the title 'Gas Oil,' in these three columns there are a number of entries made which are not contained in the original.

The Master: The Master notes the condition of the so-called office copy as compared with the original works copy for the month of May, 1919, at the 99th Street station. I think it would be better if photostatic copies were made of those two sections, so we can put it in the record with such explanation as may be applicable to it.

Mr. Ransom: It is readily explicable. Even Edgerton ought to have understood it.

Mr. O'Brien: I call the Master's attention further——

The Master: Don't waste any more time, because we are going to have photostatic copies in the record.

Mr. O'Brien: I show you right here the erasures that have been made in the original works book at the bottom, where there was certain inscriptions, also the erasures that have been made under some of these columns under the title, 'Oil.'

The Master: I have noted the condition. We will have photostatic copies made of it, and then we will have it in the record as an exhibit.

Mr. Ransom: It is already in the record, isn't it?

The Master: What I mean is, a picture of it.

Mr. O'Brien: I now call your Honor's attention to the fact that on the other side of the page, which has not yet been marked in evidence——

The Master: The whole book is in evidence. You are using a part of a book that is marked in evidence.

Mr. O'Brien: Well, it really was not formally offered in evidence.

The Master: Both books are in evidence.

Mr. O'Brien: You are so ruling?

The Master: Yes.

Mr. O'Brien: I call your attention to the column entitled 'Tank Yard Fuel' in the original book, where there are various entries made from Thursday, the 22nd, down to the end of the month, showing Seaboard coke, Astoria coke, in separate columns, 'Coke Used,' 'Coke in Pounds on Hand.' Various entries are made for those days in the original book which are entirely omitted from the office copy. We will not take up time with other comparisons. They are quite numerous.

The Master: They are all in May, 1919, are they not?

Mr. O'Brien: If your Honor rules that these books are in evidence—no, I do not confine my criticism to that. The one I am pointing out to the Court now is May, 1919. His Honor has ruled that these are in evidence over our exceptions.

Mr. Ransom: No exception was noted.

Mr. O'Brien: It is noted now, to the ruling of the Court, if it was not noted before. The fact is that there is a general understanding that we are excepting to all your Honor's ruling. That being so, I will not take up the time of the Court at this time to make further comparisons in other months. That can be done in our brief.

The Master: Which brief? We might as well make this note in the record. I am not joking when I say that there will be no time for briefs. I shall expect counsel to be familiar enough with their views and the record in this case when the evidence is closed, to be able to give me their views and point out the particular parts of the record which they claim supports their contentions.

Mr. O'Brien: Do you think that where we have been trying a case for seven months, or more, say eight months, that we should be expected to proceed at once to the close of the case to point out our views to you without preparing a brief, without going over and collating the testimony?

The Master: Yes, you ought to have your notes so complete and full as to proceed to put in your contentions, if you know precisely what evidence you have put in and what has been testified to.

Mr. O'Brien: I am glad you have put that in the record, and have stated that you are not going to let us file briefs.

The Master: I have said that. It would take six months to present briefs" (pp. 12926-12932).

(6) "Nor, indeed, were these books admitted until Teele had made a thorough checking by their vouchers for the period of a month or two, submitting them in this way to an honest test of their accuracy."

We seriously question that the evidence shows that Teele "made a thorough checking by their vouchers." The Master was not satisfied with the system of checking which Teele testified he had followed. He directed him to make further specific tests. As to these latter tests, the Master shut off the cross examination of defendants' counsel and gave as the reason for his ruling that as Teele had testified he or his assistants had checked all vouchers, it necessarily followed that he had examined particular vouchers about which defendants sought "further verification" (Point I).

The only cases cited in Judge HAND's opinion (*Rowland* v. *St. Louis, etc., Co.*, 244 U. S., 106, 108; reported below under the title of *Boyle* v. *St. Louis & S. F. R. R. Co.*, 222 Fed. Rep., 546, 547; and *Northern Pac. Ry.* v. *Keyes*, 91 Fed. Rep., 47, 58) have no application to the present discussion.

In *Northern Pac. Ry.* v. *Keyes, supra,* the main issue was as to whether the reasonableness of a schedule of rates imposed by a state upon a railroad engaged in interstate commerce should be determined upon the basis of the State's "proportional," according to the relation of the length of haul within the State to the entire haul, or upon the basis of the application of the rates over the entire haul. The evidence was directed to showing whether or not the expense of business within the State could be segregated from the expense of interstate business, and as to the probative value of methods or business proposed for such segregation.

In the *Keyes* case, the impracticability of producing a great mass of original records relating to transactions covering a period of four years and of calling a large number of entrants who were scattered over widely separated distances to testify to such transactions, were the features which justified the Court in admitting as *prima facie* proof of their contents tabulations from

such records prepared under the direction of the railway's department heads who took the stand and swore that the tabulations were correct.

In the instant case the testimony covered a period of twenty months. The few witnesses who possess actual knowledge of what Mr. Brundage properly described as "the big factors" in determining the cost of making and distributing gas—the amount of oil, coal and labor used —were within easy reach. Upon a railroad such as the Northern Pacific, proof of the sale of tickets, the collection of fares, the classification and billing of freight and all the other multitudinous details which enter into the expense of operation, would necessarily have required the calling of an army of witnesses from different sections of the wide area of the several states traversed by the railroad.

In *Rowland* v. *St. Louis, etc. Co., supra*, the work-sheets and other data prepared by the railroad company were submitted to an examination by the State; a few minor corrections therein were suggested and the case was submitted on new exhibits filed by each side. These included figures *which were agreed to be mathematically correct, the only dispute being the bases employed by each side in preparing the final figures so as to show the method of dividing the expense and income between state and interstate business* (222 Fed. Rep., 546, 547).

In the *Rowland* case the fact that there was an *agreement upon the figures* makes impossible the application of the decision to the situation here. In the instant case defendants properly insisted that they be permitted to cross examine those having knowledge of the original sources of comparatively few of the figures. The denial of this request cannot be justified by the plea that it was "impracticable" to call a few witnesses who were easily and readily accessible.

Following the decision of Judge Learned Hand in the

instant case, came the case of *Kings County Lighting Company* v. *Nixon, et al.*, 268 Fed. Rep., 143, which was a suit in equity to have declared confiscatory and unconstitutional the statute fixing the maximum price for gas charged by the plaintiff to its consumers.

If we read Judge HOUGH's decision in the *Kings County Lighting case* correctly, it is based upon these grounds:—Gas-making companies are in the business for profit and are required by public authority to keep accounts showing their expenses and charges Any person interested in ascertaining how much it cost to make gas would derive that information from an examination of the company's books and when he learned that the accounts therein were used by the Public Service Commission whenever complaint was made that the consumers' price for gas was too high, he could not doubt that the books honestly reflected the situation.

We confess that we are unable to follow Judge HOUGH's reasoning. He says:

> "The object of the statute (giving the Public Service Commission the power to prescribe a uniform system of accounts for public utility corporations) has been well pointed out in *Peo. ex rel. New York Railways Co.* v. *Public Service Commission*, 223 N. Y., 378. It is to make the method of accounting by the regulated corporations uniform 'so that the accounts could be readily comprehended by those required to examine the same.' The object is, '*not to regulate the management of their finances* but to show what the management was.'" (Italics ours.)

Gas consumers are entitled to something more than a mere array of dumb figures when they seek information about the rising price of gas. Operating expenses may be unreasonably expanded by incompetent or dishonest management. Judge HOUGH apparently cannot believe this,

because, forsooth, the business of all public utilities is conducted for profit. If the Public Service Commission has not the power to *regulate the management of their finances*, how are gas consumers to know by a mere examination of figures whether operating costs reflect honest and efficient management? The fallacy of Judge HOUGH'S reasoning is demonstrated by a few excerpts from the record in the instant case.

Mr. Brundage testified:

> "*By Mr. Hayward* (formerly counsel to the Public Service Commission).
>
> Q. I will go back to my original question. Have you got this account which is provided here (in the Uniform System of Accounts prescribed by the Public Service Commission), 'Gas Engines?'
>
> * * * * * * *
>
> A. We have not, because we do not use them.
>
> * * * * * * *
>
> Q. Benches and retorts. A. Capital account. I found no such charges during the year 1918, therefore there was no account.
>
> *By Mr. O'Brien.*
>
> Q. Don't you carry it over from the other year? A. Yes, we do, summarizing these items in one account, 'Fixed Capital since December 31st, 1918.'
>
> Q. Well, you carried over a good many other accounts didn't you, into that book, in which you made no entry for 1918; why not this one? A. I have carried this balance forward—every balance was.
>
> Q. You just answered Col. Hayward that you did not have any account for that year. A. Certainly, we have no charges in that account for this year.
>
> Q. You are changing your term now. Is there an account in that book for the year 1918? A. No, we had no charges for that account during the year 1918.

Q. Why haven't you got even the balance recorded there, since you record every other balance? A. All the balances of all construction accounts are carried forward in this ledger, but are summarized for matter of convenience in this account.

Q. Is that summarized there? A. That is summarized—*buried in here.*

Q. Buried? A. Yes, it is.

Q. It is a burying ground, after all? A. If you want to use that phrase.

Q. You used it? A. Perhaps it is not an apt expression.

* * * * * * *

By Mr. Hayward.

Q. Let us see if we can find it. The thing Mr. O'Brien is asking you about, I mean. You say it is buried; let us dig it up. A. To do so you would turn up the account at whatever station it was, and here you would find your accounts listed by years (indicating), summarizing all the construction accounts. We will take the item * * * one of the items of construction work at the 14th Street station in the year 1916 was furnishings, boilers and accessories, and you go back to the 1916 ledger and you find that account set up. And in that year that account is carried in one pot account * * * for the 14th Street station.

* * * * * * *

Q. I would like to know how I would find that item here? A. Go back to the year that the construction took place.

Q. *How would I know what year it took place? I am a stranger,* I have not been there for thirty years.

The Master: I am not going to permit that, for this reason: I permitted an inquiry of this witness to show whether he was keeping certain accounts under the titles required by the Public Service Commission.

Mr. Hayward: He has shown that he is not.

The Master: You have brought it all out, I think. *I am not going to let you go into how you as a stranger could dig up an item* * * *" (Rec., pp. 1750-2).

By the Master.

Q. Is there any item there for the sale of gas? A. No, there is not.

Q. What is this Kingsbridge holder? What has that reference to? A. That is a holder at Kingsbridge operated by the Consolidated Gas Company and owned by them, and a part of the cost of the holder is billed to the Central Union Gas Company.

Q. Why? A. Because it is operated partly for their benefit.

Q. Don't they get gas out of it? A. They do.

Q. How does that gas go? Don't you get paid for that gas? A. Not to the Consolidated.

Q. Whose holder is it? A. The Consolidated owns the holder.

Q. Who makes the gas that is in the holder? A. *That will be an engineering question, your Honor, that I cannot answer, as to just which gas gets into that holder.*

Q. Do you know why it is charged to the Central Union? A. For the use of the holder? Part of the cost of operating that holder is charged to the Central Union Gas Company.

Q. Do you know why? A. *Not from a technical standpoint.* I do know that holder is operated partly for the benefit of the Bronx companies. *An engineer could answer that question better than I could.*

Q. Where does the Central Union Company operate? A. In the territory adjacent to Kingsbridge, to the east and north.

* * * * * * *

Mr. Ransom: We can show that by an engineer who is familiar with those things.

* * * * * * *

> Mr. Hayward: *If it takes an engineer to explain the books,* it seems to me it is important" (Rec., pp. 1763-5).

Mr. Teele testified that there were numerous occasions when he was compelled to consult complainant's officers, engineers and employees concerning entries in complainant's books which of themselves convey no definite information.

It was also shown that it was complainant's practice not to remove plant at the time its use was discontinued, and not to write the retired plant off its books until long after its use had ceased.

When these circumstances are considered, it seems idle to contend that a consumer would be able to ascertain what it costs to make and distribute gas by a mere examination of the gas company's books.

It may be answered that if one of complainant's consumers went to its office, his difficulty in comprehending figures, which expert accountants found it hard to understand would be removed by frank explanations offered by complainant's officers. The record shows that on almost every occasion when defendants endeavored to elicit facts from complainant's officers, engineers and other employees, they were given answers which disclose either indefensible ignorance or wilful evasion.

In concluding his opinion Judge HOUGH cites a number of authorities in support of his statement:

> "The use of entries kept in the regular course of business, and of abstracts of such entries, when the practical inconvenience of producing the entrants on the witness stand plainly outweighs the probable utility of so doing, has greatly increased of late years, and properly so. Otherwise modern business could not be investigated in courts. Confining reference to the Appellate Court of this Circuit, instances may be found of using the train

> sheet of a train dispatcher (*Chesapeake, etc.*, v. *Stojanowski*, 191 Fed., 720; 112 C. C. A.), books kept even by assistant weighers and in a criminal case (*Heike* v. *United States*, 192 Fed., 83, 112 C. C. A., 615); the books of banks and abstracts from them as evidence against the bank official under indictment (*Parker* v. *United States*, 203 Fed., 950, 112 C. C. A., 251); similar books as against the surety of a dishonest employee in a civil suit (*American Surety Co.* v. *Pauly*, 72 Fed., 470, 18 C. C. A., aff'd. 170 U. S., 133, 18 Sup. Ct., 552, 42 L. Ed., 977); any maritime papers commonly kept under international maritime customs (*Grace* v. *Browne*, 86 Fed., 155, 29 C. C. A., 621; *Bacon* v. *Conroy*, 172 Fed., 532, 97 C. C. A., 158); and the books of controlled and controlling corporations in (*Barber, Etc., Co.* v. *Forty-Second St. Co.*, 180 Fed., 648, 103 C. C. A., 614)."

An examination of the cases cited will show that several of them are exactly contrary to the propositions stated by Judge HOUGH and that those seemingly in harmony with his contention have distinguishing features from the case at bar.

In *Chesapeake & O. Ry. Co.* v. *Stojanowski*, 191 Federal, 720, certain train sheets were held to be competent evidence because

> "the train dispatcher (*the person who made the sheets*) *was on the stand himself*. The Court held that although he made the entries from *information*, the particular information was communicated by station masters, etc., at the very time and were communicated in the regular course of employment and under conditions and incentives requiring exactness and accuracy."

The difference between that case and the instant case is apparent. In the case cited the entries were made *at the time*, in the regular course of duty, *and the entrant was produced upon the stand.*

In *Herke* v. *U. S.*, 192 Fed., 83 (a criminal action),

> "the books or papers introduced were books on entries *made at the time,* by *persons* who were called as *witnesses* and who were subject to cross examination,

the Court particularly writing:

> "The prosecution did not offer these books as official government records which manifestly they were not, *but produced witnesses to prove* them."

The books in question contained the entries of certain weights taken by a private concern on unloading merchandise, and were introduced in evidence to prove a conspiracy against the Government. Commenting further on these non-official private records the Court said:

> "They do not always prove themselves upon mere identification, as government records do, but we are satisfied in the case at bar there was *sufficient proof of their substantial accuracy* to warrant their admission in evidence."

Clearly from this case it is apparent that the rule requires corroborative proof of the books; that is, proof of their accuracy.

In *Parker* v. *U. S.*, 203, Fed., 950, the facts and the opinion of the Court relative to the introduction of books are contained in the case of a codefendant of the defendant Parker, *i. e.*, in *Wilson* v. *U. S.*, 190 Fed., 430, in which case the Court upheld the ruling, allowing books in evidence without calling the entrant, because

> "(1) There was no point made, that the person who made the entries was not called; (2) that the accuracy of the books was not questioned; (3) that the only ground of objection was that the defendants were not bound by books they did not keep,"

the Court particularly saying:

> "In our opinion these considerations (various contentions as to hearsay) should have great weight in a court of law, although in *this case* we do not feel called upon to state any broader exception to the hearsay rule than the necessities of the case require";

which were stated as follows:

> "The question involved was whether statements made by a party relating to the history or transfers of stock of a corporation or statements concerning the financial condition of the corporation are true or false, and *no contention* is made that the books have not been *accurately kept*, that such books made in the *regular* course of business, should be received in evidence, in proof of the statements they contain."

The books were only admitted, because defendant had waived his constitutional right to be confronted with the witnesses who made the entries, and further because defendant did not claim the books were incorrect.

In *American Surety Co.* v. *Pauly*, 72 Fed., 470, certain books were admitted because, as the Court held:

> "All the entries * * * were proved by the individual who made them from original memoranda supplemented by proof that such original memoranda were found to be correct or correctly made."

The entries in this case were made by the person who testified; the witnesses swore they were correctly made from original deposit slips and checks, furnished by a person now dead; but that the slips bore marks that they had been verified before reaching him (bookkeeper). The Court did hold, however, that the teller who passed or verified the slips, if alive, should have been called; saying, however,

> "In the absence of evidence to the contrary it would presume that he had properly discharged the duties of his office."

In this case also, the ruling of the Court is exactly the reverse of that claimed by Judge Hough. If alive the Court would have insisted on the testimony of the man who verified the slips.

In *Grace* v. *Brown*, 86 Fed., 155, certain papers were admitted without testimony of the witness who made them, because, as the Court said, they were

> "of a public nature (maritime papers) made by persons specifically appointed for that purpose."

The Court also said they were admitted upon the same theory as official registers, quoting Greenleaf, Sec. 483:

> "The extraordinary degree of confidence reposed in such documents is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose but partly also on the publicity of their subject matter."

The distinction between this case and the one at bar is also apparent. The papers or books in the instant case are private and non-official.

In *Bacon* v. *Conroy*, 172 Fed., 532, the question involved was simply one concerning the recollection of a witness, the Court holding it was better practice to introduce in evidence a log of a ship *duly authenticated* than proof by a witness who testified as to the matters after looking at the log, but who had no independent recollection, but inasmuch as he knew the entries in the log were correct *when made* the log should have been admitted.

This case, therefore, instead of holding for the proposition advanced by Judge Hough, is directly opposed

to it; the log was admitted *because* there was evidence of the *person who made it that it was correct.*

In *Barber A. P. Co.* v. *Forty-second St., etc., Ry. Co.*, 180 Fed., 648, the facts and the issues involved were not at all like those in the instant case. In the *Barber* case, the question was not as to the competency of books in general, but simply a question as to the effect of the books against the company itself. There was a consolidation of railroads and the books of one of the controlled railroads was kept and made and written up in the office of the controlling road or parent company. All the Court decided in that case was that the books were *prima facie* evidence against the company and it was bound by their entries, even though the books were kept and prepared in the office of the controlling company.

Law Governing Admissibility of Books.

To make book entries admissible the evidence must show that they are original entries.

It must appear that the entries were made by a person having knowledge of the facts entered, or that information was indicated to the persons by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make report thereof for entry on the books.

It has been held that where the clerk who makes the entries has no knowledge of their correctness, but makes them as the items furnished by another, as, for instance, where entries are made by a bookkeeper from reports made by a foreman, it is essential that in addition to the

oath of the party making the entry, the party furnishing the items should testify to their correctness, or that satisfactory proof thereof, such as the transactions are reasonably susceptible of, from other sources should be produced.

17 Cyc., 394, 395, and cases there cited.

In *Collins* v. *Collins*, 102 App. Div., 204 (N. Y.), the following facts appear:

> "The sole issue was as to the number of days on which the plaintiffs had done work for the defendants; one of the plaintiffs testified that he was unable to state the number of days on which work was performed, but that such information was contained in a time book and that he could only answer from the book. He testified that the time books were made up from time given in by the timekeepers; that the particular book in question was made by the timekeeper under his supervision, from the timekeeper's book, and that the latter got his time * * * from the men himself. He also testified that the men sometimes reported to him and sometimes he went 'to the job' and that he looked over the timebook every day in order to see that it was correct. The bookkeeper was dead, but neither the timekeepers nor the workmen were sworn, nor was their absence explained."

It was held that it was improper for the Court to allow the timebook to be read in evidence.

That in order to allow the reading of the timebook in evidence, it was not enough for the plaintiffs to show that the entries in the timebook were made by the bookkeeper,

but that it was also necessary for them to show, by the timekeepers or the workmen, that the reports made to the bookkeeper were correct.

In *Consolidated Safety Pin Co.* v. *Humbert*, 128 N. Y. Supp., 710, 711, New York Supreme Court, Appellate Term, which was an action for the price of goods sold under a contract alleged to have been made with two defendants as partners, receipts for cases of pins delivered were introduced in evidence, but these failed to show the number of gross contained in the cases. To prove this fact the plaintiff produced its bookkeeper, who testified that she had no knowledge of the shipments, except as derived from the books. The bookkeeper had no personal knowledge of the shipments, but simply transcribed into the book slips handed to her by the shipping clerk. She was permitted "to refresh her recollection" from these entries. Of this method of proof the Court, LEHMAN, *J.*, writing the opinion, said:

> "Since she had never had any personal knowledge of the transactions, all her testimony is absolutely incompetent and merely hearsay. To render the entries themselves admissible, her testimony should have been supplemented by the shipping clerk's testimony as to the correctness of the slips (*Mayor, etc.*, v. *Second Avenue R. R. Co.*, 102 N. Y., 572). This defect is not cured by the production of the delivery slips. The testimony of the bookkeeper is objectionable, not because the books are perhaps inaccurate, but because the testimony is only hearsay."

In *Mayor, etc., of New York* v. *Second Avenue R. R. Co.*, 102 N. Y., 572, a timebook was admitted in evidence only after proof by the foreman that he made correctly the entries therein as reported to him by the acting foremen, and the testimony of the acting foremen that they had knowledge of the facts so recorded and correctly reported them to the foreman.

The case of *Mayor, etc.*, v. *Second Avenue R. R. Co.* (*supra*), was followed in *Blum* v. *Davis*, 95 Misc. (Supreme Court, Appellate Term), 140, where bookkeeper's entries were rejected for the reason that the shipping clerk showed inability to state the amount and character of the goods included in the shipment. BIJUR, *J.*, said:

> "It needs no citation of authorities to demonstrate that no proper foundation, even under the most liberal construction, was laid for the introduction in evidence of this paper." (A paper alleged to be a copy made by the bookkeeper of an entry in the books, which in turn was alleged to have been made from a shipping slip made by the witness.)

In *Pneumatic Signal Co.* v. *Texas & Pacific R. R. Co.*, 216 *N. Y.*, 374, which was an action to recover compensation for the construction and installation of an interlocking signal system upon defendant's railroad, which system the defendant had refused to accept, the defendant was allowed, over objection and exception, to lay before the jury, as evidence of its intent to reject the interlocking system, a large number of reports from its tower men and reports received by one of its officers made from data claimed to have been furnished by employees, *most of which were not verified by the persons who made them*, and with no proof from any source that the statements contained in the reports were true or had ever been known to be true by anybody. The Court held that this was error; that not being evidence of any fact they were not admissible against the plaintiff on the issue of the acceptance of the plant in controversy:

BARTLETT, *J.*, said (italics ours):

> "It is impossible to appreciate how they prove themselves to be true in any sense. At most they were only evidence of what the signers said they had observed. How these reports tended to show

what the intention of the defendant corporation was in respect to accepting or rejecting the interlocking plant furnished by the plaintiff we are unable to perceive. The fact, if it was a fact, that the system worked badly may have a bearing on the *probability* of acceptance; but these reports were not proof of that fact *in the absence of testimony showing that the statements therein contained were true. The cases in which reports of multitudinous occurrences have been admitted in evidence are cases in which it has been proved that the facts were truthfully noted down when the events occurred by those having actual knowledge on the subject.* Thus in *Mayor, etc., of N. Y.* v. *Second Ave. R. R. Co.* (102 N. Y., 572), the correctness of the entries in the time book was verified by the general foreman who made them as reported to him by the several gang foremen, who in turn testified that they correctly reported to the general foreman the names of the laborers and the time during which they had worked as actually known to them. More than two-thirds of the reports of the towermen in the present case were wholly without any support of this character. Not being evidence of any fact they were not admissible against the plaintiff on the issue of the acceptance of the plant in controversy."

In the case of *The Norma*, 68 Fed. Rep., 509, it was held:

"A bill of particulars containing numerous items of work and materials may be proved after destruction of the original memoranda, from which the account was made up, by the evidence of the bookkeeper that he correctly transcribed the memoranda, and the evidence of the persons who made and furnished the memoranda to him that the same were correct; *but the proof is insufficient, where it consists only of the bookkeeper's testimony as to the correctness of his transcription.*"

It will perhaps be argued by complainant that the principles announced in the foregoing cases are antiquated in so far as they relate to multitudinous transactions. Nevertheless, there are some fundamentals which are preserved.

It is still insisted that before secondary evidence will be permitted, there must be satisfactory proof that the best evidence of which the case is susceptible cannot be adduced. In the instant case this wise and salutary rule of evidence was violated in circumstances which no plea of alleged overwhelming necessity can justify. Books which were the tenth or twelfth reproduction of original data were received without any other evidence of the accuracy of their contents than the testimony of the complainant's assistant secretary whom the Master himself conceded had no personal knowledge of the transactions therein contained (Rec., p. 1577). It is confidently submitted that no adjudication can be found which will justify this procedure.

The rule governing the admissibility in evidence of books of account is thus stated by Wigmore (italics ours).

> "The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying *in the personal knowledge of the latter*, there is no objection to receiving that evidence * * * provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so."
>
> *Wigmore on Evidence*, Section 1530, p. 1895.

In the instant case the plea on which the complainant's books were admitted in evidence was that "the practical inconvenience of producing on the stand the

numerous persons" who could testify to the multitude of vouchers and other original data on which its books are based "outweighed the probable utiltiy of doing so." There the plea ended. No attempt whatever was made (nor was the failure to make it explained) to produce a witness able to testify to personal knowledge of the facts recorded in the underlying data on which the books purport to be based.

In *Wells Whip Co.* v. *Tanners Mutual Fire Ins. Co.*, 209 Pa., 58 Atl. Rep., 894, testimony to the amount of a stock of goods, by the secretary of the company, based on an inventory compiled in part by his clerks, was held admissible, without calling the clerks. But in this case, it appears that the secretary had been twenty-two years in the business; that he knew the value of the goods in question; *that he had personal knowledge of such value* derived from the books and from an inventory made by the company; that when such inventory was made, he and the treasurer and manager of the company *verified the figures* and he positively testified that the amount of goods was in the factory as represented by the inventory. In these circumstances, the Court very properly held:

> "It is evident from his own knowledge and from that based upon the books under his control, and from that possessed at the time the inventory was made, that he was competent to testify to the value of the property destroyed. * * * Appellant's objection that the proof was secondary, because the men who actually counted the articles and weighed the materials were not called, lacked substance, for the reason that the inventory was made under the directions of the witness and was duly verified by him" (p. 897).

In *Pelican Lumber Co.* v. *Johnson*, 44 Texas Civil Appeals, 206, 207, a secretary-manager was allowed to

testify that the books were *to his own knowledge correct*, though he was not the bookkeeper making the entries and the bookkeeper was not called. The Court said:

> "If the element of personal knowledge is present, it can make no difference in principle that the bookkeeper himself is dead or otherwise absent. * * * In point of fact, it may often happen that the bookkeeper has little or no actual knowledge of the transactions he is called upon to record, and the rule of reasonable probability, if not of certainty, would be better subserved by the admission in evidence of clerks, salesmen and others having a personal knowledge of the transactions" (p. 208).

In *Reyburn* v. *Queen City Savings Bank & Trust Co.* (3rd C. C. A.), 171 Fed. Rep., 609, 615, 616, it was held (headnote):

> "Entries in the books of a bank showing discounts or debits and credits from day to day, are admissible in evidence in favor of the bank to establish the time of a transaction there recorded, where it is shown that the books are books of original entry, or as nearly so as possible, and such as the business of the bank requires, and upon the faith of which such business is transacted, and when the entries *are duly proved by the persons who made them*, as having been made by them on the dates shown in the regular and usual course of their employment."

GRAY, *J.*, said:

> "Of course, judicial discretion in every such case is appealed to, to see that such testimony, when offered, has been safeguarded by such an environment of circumstances as will give it the requisite circumstantial trustworthiness. The entries accordingly must have been made in the regular course of business, *and must be testified to, if possible, by the entrant*, who must be shown

to have been one of those whose ordinary business it was to make such entries, and that such books are to all intents and purposes, or as nearly possible, original entries and such as the business of the bank requires and upon the faith of which such business is transacted. Take, for instance, the case before us. We have the entries from the discount register and the discount ledger, the first named being undoubtedly a book of original entries, *and we have the oath of the clerk who made the same.* We have also the individual ledger account, in which the credits to the Potteries Company were made upon written information from the discount clerk, and the debits against that account upon the same page, entered as sworn to by the testifying clerk in charge of the book. This book, too, was as nearly as possible a book of original entries; at least there was no other book in which a specific charge was made against the Potteries Company. These debits were necessarily made, either from the checks themselves of the Potteries Company, or memoranda furnished by a paying teller, but they were made in due course of business *and regularly made by the entrant who swore to them and whose business it was to make all such.* No paying teller could possibly testify as to the date and amount of a particular payment, and the bank itself must depend upon the fidelity and accuracy with which the entries in question were made. * * *

Wigmore, in his excellent work on Evidence, says:

"The practical impossibility, on grounds of mercantile inconvenience, of producing all the clerks, salesmen, teamsters, or the like, who have contributed their knowledge in making up the items of voluminous accounts, is by some courts recognized as a sufficient ground for non-production. * * * The policy of these rulings, so far as it exempts from the production of all but one verifying person, on the

ground of mercantile inconvenience, is deserving of common adoption.'

In addition to the testimony of the entrant clerks above referred to, the president and secretary of the bank was called as a witness and testified that he was the general supervisor of the books of the bank and kept in touch with it all as it was transacted. He produced the original sheets from the books of the bank containing the entries already testified to by the clerks keeping the same, certified copies of which were attached to the return made by the commission who took their testimony. He testified to being familiar with these entries and upon their faith was willing to swear, as he did swear, that the withdrawals by the Potteries Company of certain sums of money out of the proceeds of the discounted notes between the 12th and 14th of November, were actually made before reception of the telegram received from the defendant on the morning of the 15th."

In *Reyburn* v. *Queens City Savings Bank & Trust Co.* (*supra*), there were several significant features of the evidence which was held to justify the admission of the books. In the first place the entries were duly proved by the persons who made them, as having been made on the dates shown in the regular and usual course of their employment. Secondly, the books received were books of original entry as contrasted with books which were merely copies or reproductions of some others; and third, in addition to the testimony of the entrant clerks there was other and independent testimony of the transactions recorded in the books. None of these features characterize the evidence in the instant case. No one who made the entries or any of them was called by the complainant; the books by no stretch of imagination can be classified as books of original entry; nor was any witness called who gave testimony of personal knowledge

of their contents. It should also be observed that "the one verifying person" mentioned by Wigmore in the quotation from that author, referred to in the Court's opinion in the *Reyburn* case, *was the entrant clerk.*

In *State* v. *Stephenson* (Supreme Court of Kansas), 76 Pac. Rep., 905, the Court, in construing a statute regulating the admissibility of books of account, stated:

> "It is not necessary to admissibility in evidence, that a book of accounts shall be kept in any particular form, nor by what name it may be called. It is enough that it is a book regularly and accurately kept, containing original entries and daily transactions of the business, made at or about the time the transactions were had. The fact that the book is called a 'ledger' does not change the character of the entries; nor is it necessary that the bookkeeper should have made the sales or billed out the goods sold, to make the book of accounts admissible in evidence. If the sales made were regularly reported *to the bookkeeper,* and from such reports, or from orders or other temporary memoranda of the salesman, the entries are promptly and faithfully made *by the bookkeeper,* the book is entitled to be read in evidence *when duly verified by the one who kept it* (General Statutes, 1901, Sec. 4835)."

In *State* v. *Stephenson, supra,* there was a conviction upon information charging the defendant with obtaining goods by means of false pretenses. In addition to the testimony of the bookkeeper above referred to, there was other and independent testimony to support the conviction, including certain admissions by the defendant. Extended discussion of this case seems unnecessary in view of the facts just stated. Our only reason for making any reference to the case is the fact that it was one of a considerable number of authorities cited by the complainant in a memorandum submitted to the Master,

in which complainant contended that the decision was authority for the proposition that books of account made up of a great mass of data may be proven without calling any of the witnesses who were concerned with said data.

San Pedro Lumber Co. v. *Reynolds* (Supreme Court of California), 53 Pac. Rep., 410, was another case cited by complainant on the same subject. The decision in that case, however, can be of no assistance here, for the very excellent reason that there the books in question which were kept under the defendant's supervision, were held to have been properly received in evidence as *admissions against interest in an action against the defendant for neglect of duty and embezzlement.*

In *Meyers* v. *Brown,* 90 N. W. Rep. (Supreme Court of Michigan 1902), 285, it was held:

> "On the question of weight of wood shipped by the plaintiff to defendant, books on the railroad, in which are kept in the regular course of business the weight of cars, from the cards on which the weights are first entered *under the supervision of the weighmaster, he comparing the entries in the books with the cards,* after which the cards were destroyed, are competent."

LONG, *J.*:

> "While this witness (the weighmaster) could not testify that he weighed the car and made the entry on the card, and it was impossible to ascertain who did, because the card was destroyed, the entry was made on the book from the card in the regular course of business. Primary evidence of the entry on the card was unattainable, but the witness testified that he compared the entry on the book with the card, thereby, perhaps, unnecessarily reinforcing the evidence of the books themselves. This evidence was admissible, under the rule that contemporaneous entries in the regular course of

business in his books by one not a party to the cause, is competent. Greenleaf on Evidence, Section 120-A, and cases cited."

In *Stolz* v. *Scott*, 154 Pac. Rep., 982 (Supreme Court of Idaho), the Court said:

"The action of the court rejecting from evidence a journal, contended by appellant to have been one of the books of account of the corporation, is assigned as error. While there is some evidence tending to show that this journal was, in whole or in part, in the handwriting of a former bookkeeper of the corporation, the bookkeeper was not produced as a witness, and there was a total failure to show that the journal contained either an accurate or a complete account of the corporation's business during the period of time it was purported to cover, and two of the defendants by whom it was sought to prove that it was a record of the corporation, were unable to identify it as such. It is said in Jones on Evidence, Section 573:

'It is well recognized that the mere production of books of account, without identification, is not sufficient to entitle them to admission. * * * In most jurisdictions it is necessary that testimony should be given authenticating the book of account and showing it to be the book of original entries kept for that purpose; also that the entries were true and correct and *contemporaneous with the transaction.* * * * The books must be identified as the account books of the party whose books they purport to be. Under the old rules it was necessary to show, by other customers or parties who had dealt with the owners of the books, that he kept fair and honest books of account; but under the later decisions the correctness of the entries must be proved *by the persons who made them or by any one who is able of his own knowledge to testify to it.* This testimony should be given by the party, if the entries were in his handwriting, or

> by a clerk, if the entries are in his handwriting, unless he is dead or out of the state, in in which case the books are admissible upon proof of the handwriting.'"

In *Stuart* v. *Camp Carson Mining & Power Co.*, 165 Pac. Rep. (Supreme Court of Oregon), 359, 362, the Court said:

> "Books of account and the like are received in testimony as ancillary to the declarations on oath of a witness who either knows the fact in general and is compelled to refer to the books for detail, or where, having at one time knowledge of the fact, he is compelled to refresh his memory from them, or failing in that, he is able to state that he knew the fact when he made the entry and that it was entered correctly. Such writings are not evidence *per se*. They do not prove themselves and are not original evidence in the full sense of the word. The books therefore must be authenticated by the oath of someone who made or directed the entry with authority, if living and capable as a witness, otherwise by proof of his handwriting posting entries. * * * Dill only testifies that he kept the book most of the time from June 20th to the same date in the successive month. He does not even say that he kept it correctly or that he had knowledge of the facts upon which his entries were founded. He does not point out even what entries he made for that part of the time that he kept the book. The greater portion of the claims for which liens are sought to be enforced were founded upon labor alleged to have been performed before he ever had custody of the book. It is true that he says that a few days before he appeared in the Circuit Court as a witness, he received the book indirectly from the secretary of the company in Seattle, but there is an utter absence of any sworn testimony authenticating it before he received it into his custody. Under all the authorities it must be laid out of the case as evidence."

V.

Complainant's proof of the details which enter into the cost of the manufacture and distribution of gas is wholly defective.

In his report, the Master made certain findings of the quantities of materials and the labor required to manufacture 1,000 cubic feet of gas; of the cost of gas sold by complainant as of September, 1919; of complainant's sales of gas; of the total cost of gas delivered; and of the average selling price of gas. In his opinion, the Master gives as the bases of his findings, complainant's books and Astoria records. He says:

> "In my findings, I have set out in detail the various elements entering into the manufacture of gas, and it is unnecessary for me to refer to them again in this opinion. *Suffice it to say that the books of the complainant company show that*, excluding gas storage expense, the actual cost of making water gas at its 21st and 99th Street plants in the year 1918 was 42.66 cents per thousand cubic feet of gas made and for the eight months of 1919 it was 48.43 cents. *The Astoria records show* that for the year ending December 31, 1918, the actual cost of making water gas in Astoria was 40.54 cents, and for the eight months ending in August, 1919, was 45.75 cents. * * * Having in mind that the complainant must prove its case beyond any reasonable doubt, I reached the conclusion that the safest basis upon which to work was the actual result of operations in the Astoria plant for the eight months ending August 31, 1919, that plant being a most efficient manufacturing plant with modern labor saving devices. *The Astoria books of account, manufacturing records and supporting data for this period were placed in evidence by the defendants as a part of their case*, and were tabulated and analyzed by the defend-

ants' accountants, as well as by the representatives of the complainant in rebuttal. On the basis of the price and costs during that period of 1919, the actual cost of making coal gas, excluding storage, was 47.31 cents. The actual cost of making water gas was 45.75. On the basis of the quantities produced, the cost per thousand cubic feet of mixed gas was 46.40 per thousand cubic feet and on the basis of 78 per cent. water gas and 22 per cent. coal gas prevailing in the gas sales of the complainant as of September, 1919, the cost was at least 46.09 cents per thousand cubic feet of gas made" (Opinion, Rec., 52-a).

None of the above mentioned findings nor the statements just quoted from the Master's opinion is warranted.

Judge HAND accepted the bases of the Master's findings, to wit, the complainant's books and Sangster's analysis of the Astoria Company's books.

In fact, Judge HAND went even further than the Master and accepted 4.12 gallons as the quantity of oil necessarily used in the production of 1,000 cubic feet of water gas. The unfairness of this figure is apparent from complainant's own evidence. The average use of oil in its 99th Street plant in all the years 1909 to 1918, inclusive, as shown by its books was only 3.81 gallons. Had this figure been used, the result would be a difference of $427,800. We reach this figure as follows: .31 gallons on every 1,000 M feet, on 20,000,000 M feet, 6,200,000 gallons, which, taken at the price per gallon found by Judge HAND (Rec., p. 156a) of $.069—omitting his "plus for lighterage"—amounts to at least $427,800. Including lighterage, it would of course be more.

We shall discuss, presently, complainant's attempt to supplement these books by Mr. Woods' hypothetical figures.

The Astoria books cannot be taken as evidence of the cost of making gas at that plant.

So far as complainant's plants on Manhattan Island are concerned, there is nothing, with the exception of complainant's books erroneously admitted in evidence (Point IV), to show the number of men *actually employed* by complainant, the amount of oil and coal *actually used*, or any of the other elements which comprised the *actual cost* to complainant of the manufacture and distribution of gas, nor was there anything to show the *amount of gas actually sold*.

The Master's statement that he had "reached the conclusion that the safest basis upon which to work was the result of actual operations in the Astoria plant for the eight months ending August 31, 1919," clearly has no other foundation than his use of the Astoria Company's books. There was no testimony by any witness of *actual operations at Astoria* or at any other plant. In the absence of competent evidence of these details, it is impossible to justify the Master's findings.

On the trial the Master made a correct statement of the facts to be established to justify findings of what it costs to make and distribute gas. He stated:

> "The Master: * * * The big question here is, how much does it cost to make gas. It seems to me that if I were trying the case, * * * I would first start out to say that to make gas it requires coal, gas oil, and certain other ingredients and labor and I should call the witnesses to prove how much coal and how much gas oil and how much other things it takes to make a thousand feet of gas. I should prove how much labor was required, how much time was required, and that I should think would give the Master a pretty quick and complete picture as to just what he had to get into. * * * Now, I am going to get that before this case is through, and if I have any power to direct the mode of putting in the proof,

sooner or later, I will insist on getting that very thing, because I won't guess at how much it costs to make gas. I have had experience enough to know that I can prove in a very simple way how much it costs to make a suit of clothes or a pair of shoes or any other article, and it ought to be just as simple to show how much it cost to make a thousand feet of gas, and I am going to find that out. * * * The Consolidated Gas Company in order to have the courts interfere with the legislative enactment that they must charge not more than eighty cents, have got to show what it costs to manufacture gas. Now, I am not going to decide this case until they show, and I am not going to make a finding until they show it. What I am going to get into the record before I get through is this, how much coal does it take to operate a plant for a day or a week; how much oil does it take to manufacture a thousand or a million cubic feet of gas; what other ingredients go into it? I am leaving out now all overhead and other items. How much time does it take to make it; what help do you need to make it; how many men do you have to have; how much do you have to pay those men; how much have you paid them? And when I find that, taking the unit of a thousand or a million cubic feet, if it takes a week to make it, that it takes so many men at the machine to make it and takes so much oil and so much coal to operate the plant, I can immediately figure up the various items as simple as you and I are discussing it, divided by the unit of a thousand or a million, and I will know how much it takes to make the gas that goes into the holder. And now, when it comes to distribution of gas, if that is an element they are entitled to have, * * * I am going to get at it in the same way. I think there is entirely too much mystery in the trial of a lawsuit in arriving at a fact. Facts are usually perfectly simple, except in negligence suits * * * but how much it costs to make a thing we can find out" (Rec., pp. 1876-1880).

The procedure which the Master permitted complainant to follow was to call its engineer of gas manufacture, George E. Woods, who set up a hypothetical plant and gave opinion evidence of the labor and material necessary to make a thousand cubic feet of gas. Mr. Woods' testimony will be searched in vain for any proof of concrete facts.

Speaking of gas production cost, Mr. Woods testified:

> "Gas production cost of today would be about 2½ cents a thousand (cubic feet). Repair labor would be 1½ cents a thousand. As of 1914, it would be somewhat less than that" (Rec., p. 5429).

As an abstract proposition, the figures given by Mr. Woods may be correct, but as he gave no testimony of the number of men *actually employed by the complainant*, there is no foundation on which to base the units to which he testified.

All attempts to obtain from Mr. Woods any definite statement of his *personal knowledge* of the number of men actually employed or the amount of material used by complainant, were fruitless. *His testimony clearly indicates that he had nothing but a hypothetical plant in mind.* Occasionally when he was pressed to justify his assertions, he took refuge in the answer that he obtained his information from "the books" or from what one or more of complainant's employees told him.

> "Q. Can you give us any idea or give us an accurate idea as to the amount of labor required for the handling of boiler and generator fuel per thousand cubic feet under present wage conditions?
>
> Mr. O'Brien: I object as incompetent, irrelevant and immaterial. The question is vague; it does not refer to a specific time or a specific place; it does not describe the con-

ditions under which the witness is asked to give his expert opinion. The witness has not qualified as an expert, in spite of the years he has been with the complainant company, and being with the complainant company and in their employ for so many years, and under a big salary with them, I do not think he is qualified as an expert any way, even if he had expert knowledge.

The Master: Objection overruled.

Mr. Chambers: I further object on the ground that it is too general and one of the questions that the Court will determine. It is speculative.

The Master: The objections are overruled. The question is allowed.

Mr. Chambers: Exception.

Q. What about the labor handling the fuel? A. The labor conditions as to operations today in the handling of generator and boiler fuel would be about three-quarters of a cent a thousand.

Q. How about what is known as gas-making labor? A. Gas-making labor would be two and one-half cents per thousand. * * *

By the Master: Isn't this gas-making labor, this exhibit (No. 352)?

A. That is gas-making labor.

Q. Is that what you are talking about? A. That is what I am talking about. * * *

Mr. Ransom: This, of course, is merely the complainant's figure year by year, this Exhibit 352.

The Master: That is all this witness can tell you, that he bases his statement on.

Mr. Ransom: Not entirely. He is testifying to conditions today" (Rec., pp. 4669-4670).

The questions just quoted, clearly call for the expression of an expert opinion. Opinion evidence was neither necessary nor competent. The complainant's case was

susceptible of proof by lay witnesses to the facts or it was not. If lay witnesses were not able to give the amount in wages *actually paid* by complainant for the labor *actually employed* in the handling of boiler and generator fuel, proof of such facts could not be supplied by expert testimony.

Mr. Woods then proceeded to give the following hypothetical figures:

> Gas-making labor, two and one-half cents a thousand; repair labor, one and a half cents a thousand; repair materials, one and a half cents per thousand; miscellaneous works expenses, one and a quarter cents a thousand; iron mass, city water, sundry supplies, etc., one cent a thousand; renewals and replacements, three and one-half cents a thousand (Rec., pp. 4670-1).

The figures given by Mr. Woods are included in Exhibit No. 352, which was prepared by him. On cross examination he admitted that he obtained these figures, as well as all the other figures embraced in the several exhibits prepared by him, from the complainant's books; that without analyzing these books, he took the details found in said books; that, to the best of his belief, the books were kept in accordance with the uniform system of accounts, but he admitted that he did not even know that (Rec., pp. 4840-1).

> "Q. Now, Mr. Woods, can you state the cost per thousand cubic feet in this territory at the present time of coal used as generator fuel?
>
> Mr. Chambers: Same objection.
>
> Mr. O'Brien: I make the general objection that it is incompetent, irrelevant and immaterial and the further objection that there is no foundation laid by the testimony *as to the original records that bear the expense*; the witness

has not shown himself competent to testify, for the reason that the record shows that the purchase of the coal was entirely under the control of Mr. Gawtry or the men in his staff; that the foundations have not been laid by the introduction of proper testimony; that the question calls *for a mixed answer as to fact and theory*; it calls, so far as we can see, for an expert opinion, and there is no evidence in the case on which he can predicate any answer to that question, and I therefore press my objection.

The Master: Objection overruled.

Mr. O'Brien: Exception.

The Witness: $8.26 per gross ton for generator fuel" (Rec., p. 4673).

"Q. With respect to coal gas, can you state the quantity as to the number of pounds of bituminous gas coal, which under present conditions in this territory, were required per thousand cubic feet manufactured?

Mr. Chambers: I object to that.

Mr. O'Brien: I object to the question as an effort to substitute a *hypothetical question and answer for testimony as to the concrete fact as found in connection with complainant's properties in use in the public service at this time.* I object on the further grounds I have stated when I made my objection to the question to the witness with the reference to anthracite coal.

The Master: Objection overruled.

Mr. O'Brien: Exception.

A. 200 pounds of good gas-making coal will make a thousand cubic feet of gas.

By the Master.

Q. At a price of $5.90 per gross ton, how much will that cost per thousand cubic feet? A. 52.68.

Q. Now, you have to have boiler coal? A. Ten pounds in addition to the breeze that we have pro-

duced by the coke. In the drawing off of the coke there are a lot of fines, known as breeze, and that is used under the boiler, and in addition to that, there are ten pounds of fuel.

Q. At $5.12 how much would that be? A. 2.29 cents per thousand cubic feet.

Q. Do you have some labor to handle this coal? A. The cost of handling would be about 2 cents per thousand cubic feet.

Q. *That is your best judgment?* A. *That is my best judgment*" (Rec., pp. 4685-6).

From the foregoing it is obvious that what the witness testified to *were not actual conditions in any of complainant's plants.* "Expert" opinions and "judgments" were substituted for *evidence of facts.* The vice in all these questions is, that there was no evidence adduced by complainant to show that it actually used 200 pounds or any other quantity of bituminous coal to make a thousand cubic feet of gas or that its labor cost in handling the boiler fuel was "about two cents per thousand cubic feet."

On cross examination the hypothetical character of Mr. Woods' testimony was sharply emphasized. In fact, he himself admitted that he had nothing but a hypothetical plant in mind.

"*By Mr. Chambers.*

Q. Upon what do you base your coal gas cost here? A. Upon what?

Q. Yes. It was not any experience of the Consolidated Gas Company, was it? A. No; that was an operating condition that would reflect the Astoria operations.

Q. You had in mind the Astoria Company then? A. I did; * * * what it cost them.

Q. Now, then, the water gas cost; what did you have in mind in regard to that? A. The general situation as it would apply throughout the City * * * of the allied companies.

Q. *Did you have any company in mind?* A. *No*; I have made a cost here which I believed in my experience and knowledge would represent a fair cost for making water gas under the conditions they would make and distribute it. * * * *It is an average condition*" (Rec., p. 4744).

The utter worthlessness of the testimony just quoted is immediately apparent. To take "an average condition," without showing personal knowledge of the data which make up the average condition and to use that as the basis for *estimating* the cost of the manufacture and distribution of gas, seems to be too absurd for serious discussion, especially in a case of this character, where the burden of proving its case beyond a reasonable doubt is strictly upon the complainant. Moreover, if it be assumed that Mr. Woods was qualified to testify as an expert, it is submitted that expert testimony was not competent. The complainant should have established its case by testimony of actual facts.

"Q. Now, the Kingsbridge holder is used largely by the other companies you have mentioned, other than the Consolidated? A. That is right.

Q. A very small use of it is included in the Consolidated System is it not? A. A very small one?

Q. Yes. A. No, it is used somewhere between 40 and 50 per cent., *in my judgment,* by the Consolidated System.

Q. How do you ascertain this 40 or 50 per cent.; how do you find that out? A. *There is no direct method of determining that.* We know we are sending gas to the Washington Heights section, also into the Central Union and Northern Union sections. *In my judgment, without knowing exactly the amounts, I believe that the Consolidated Gas Company is using somewhere between 40 and 50 per cent.*

Q. Well, that is a very indefinite way of getting at it, isn't it? A. Well, *it is the way I did get at it and that is my judgment of what is being done*" (Rec., p. 4765).

Here again, we have a typical illustration of the manner in which the witness was allowed to substitute his "judgment" for evidence of the actual facts. As the gas which goes into the Kingsbridge holder comes from Astoria through a tunnel under the East River which connects with one of the Consolidated Gas Company's mains at East 72d Street, where it meets and is intermingled with gas made at one of complainant's plants, and as the witness testified, in substance, that there is no accurate way of determining how one gas is distinguishable from another, the amount of Astoria gas in the Kingsbridge holder used by complainant should not have been left to conjecture. The amount of Astoria gas used by complainant has an important bearing upon the apportionment of the accounts between complainant and its subsidiaries. These accounts were sufficiently complex without adding to the difficulty of simplifying them.

"Q. You know from day to day that you have got to figure on 32½ pounds (of anthracite coal) for a thousand cubic feet of gas? A. That is right.

Q. It depends upon the kind of a generator you have in mind, does it not? A. Upon the kind of generators that are in use. A modern generator as I have in mind.

Q. What type did you have in mind? A. The type of generator? The type used by the Consolidated Gas Company. • • •

Q. What plant did you have in mind? A. *I had the general situation in mind as to what all these plants would do under good operating conditions*" (Rec., pp. 4844-5).

The witness gave no testimony of *actual operating conditions.*

> "Q. How many men do you figure in labor handling; how many men handling that coal? A. *I don't know; enough to make that labor handling covering that three-quarters of a cent*" (Rec., p. 4858).

What has just been quoted is certainly vague, but what follows is even more obscure and hopelessly indefensible as the basis of a finding which assumes to determine any part of complainant's operating expenses.

> "Q. How many would it, to make that thousand cubic feet? A. Well, I probably could tell you, if you want the details. I don't know whether I have it or not (examining papers). * * * Now, you asked me how many I handled. The data was based on some sort of a proposition as we talked yesterday. You said yesterday, you asked me how many men it took to make a thousand cubic feet of gas, if you recall, your Honor.
>
> Q. What I want to know is, what you include in labor handling? A. I took the number of men, I had to base that, your Honor, on a plant of some capacity, with the amount of material that they required during the day and the number of men it would take to handle that material and reduce that— * * *
>
> *I took a plant assuming an operation of* 10,000,000 *cubic feet a day, which did not mean any plant.* I simply said a *hypothetical plant, if we were making* 10,000,000 *cubic feet a day, the result would be, so far as labor was concerned.* Materials would not vary much. *If on that same plant we were making seven and one-half or eight million cubic feet,* your labor will go up; *if you should run it thirteen or fourteen million feet, your labor will go down;* for instance, labor handling, sometimes, as the result of this *might be* 85 or 90, instead of 75, and it *might* go down to 60, and an average of

75, your gas making labor *might* average 2½ cents or it *might* go up to 3 cents or down to 2¼ cents; but taking the average conditions, you understand there are a lot of fixed charges that continue along here when you are operating; many of the charges are the same at ten million as they would be at fifteen million, and the same as they would be at five million, covering a long period of time, covering the four seasons, at any rate to arrive at a figure covering this range of variations. Of course, *if* you were operating ten million feet, day in and day out, with the same kind of material, your labor conditions *would be* approximately the same every day" (Rec., pp. 4858-4860).

The witness gives a lively illustration of the capacity of the English language for potential moods and tenses, but he gives no actual facts.

"*By the Master.*

Q. Would you say that to make this 28,000,000 cubic feet a day (referring to the 21st Street plant) you would need as many as 131 men in the actual capacity of the gas produced at the plant? A. * * * *We would probably* use more than that, because we are not making 28,500,000 cubic feet (fol. 14580).

Q. * * * I wish to know how many men you need to produce 34,000,000 cubic feet a day. Can you tell me that? A. Yes, *I would give you an approximation.*

Q. * * * I want to know how many men you will need to make the gas; not the handling of material, or the repair labor or anything else, but just to make the gas? A. 175."

It was useless for defendant's counsel to direct the Master's attention to the palpable fact that the objectionable feature of Mr. Woods' testimony was, that he was not narrating what went on under him, but was giving

an opinion of something ideal that might be carried on (Rec., pp. 4863-4). It is the continual repetition of this hopelessly incompetent testimony which contributed largely to the expansion of this record to its enormous volume of nearly 16,000 pages.

> "Q. How many men did you *assume it would take* to handle this coal? A. I think in 10,000,000 I figured about 17 men; that is my recollection" (Rec., p. 4875).

What the witness referred to was, that in a hypothetical plant with a rated daily capacity of 10,000,000 cubic feet, it would take 17 men to handle the coal. In the same kind of a plant, he testified that there would be required in the gas making labor, a superintendent, an assistant superintendent, clerk, generator fireman, 12 gas makers, 12 fire cleaners, 6 coal wheelers, 6 boiler firemen, 3 engineers, 3 oilers, 3 pumpmen, one oiler and four machines (Rec., p. 4894). In giving this testimony, the witness was asked:

> "Q. Did you have in mind any particular plant?" To which he replied:
> "I did not" (Rec., p. 4896).

The answer just quoted is typical of answers made to similar questions and clearly indicates that the witness was not attempting to testify to the number of men actually employed in any of the complainant's plants. He was careful to confine himself to a hypothetical plant of 10,000,000 cubic feet daily capacity. He was asked where he located his hypothetical plant. He answered that it would not make any "material difference" where a plant making "just 10,000,000 cubic feet" was situated (Rec., p. 4899). He added, however, "I have testified that you want to be on the water front" (Rec., p. 4900).

Continuing his description of the 10,000,000 hypothetical plant, Mr. Woods testified:

> "I did not itemize repair materials account, except that I know it would take about that much of those various kinds of materials.
>
> Q. You *estimated* it would take that much material? A. I did. * * * I knew from my own knowledge that is about what it would require, *covering a plant of that kind.* * * * *It is an estimate based on my judgment of an average operating condition for a year*" (Rec., p. 4908).
>
> Q. How many pounds did you estimate for this (boiler fuel)? A. I did not make any estimate on that as to the different quantities. It would vary for the different stations. *Some might have to do* more pumping than the others. That was taking the distribution of the companies as a whole as to what it would cost for that purpose. * * * *I think the average of all companies would closely approximate that*" (Rec., p. 4911).
>
> "Q. But this particular item, gas storage expense, covers the expense of all these companies? A. It is an average of what would apply on gas storage expense, covering the proposition as a whole. * * *
>
> Q. Was this an estimate, too, the same as the others? A. *It is an estimate,* based upon my knowledge of what it cost" (Rec., p. 4912).
>
> "Q. How many men did you consider there (handling residuals) and the wages to be paid them? A. * * * *This was based upon a plant of about* 7,000,000 *cubic feet, daily capacity.*
>
> Q. Any particular plant, did you have in mind? A. Well, this would be something along the lines of the Astoria plants or the plants which we have, or the Central Union, *more so than as applying to our own particular plants,* where the efficiency is not so good" (Rec., p. 4930).

On cross examination by Mr. O'Brien, it appeared that Mr. Woods took the figures which he included in Complainant's Exhibit No. 351, for gas production labor cost for 1906, from the complainant's payroll (Rec., p. 5390). Mr. Woods then gave the number of employees and the rate of wages paid to each at the 99th Street plant (Rec., pp. 5396, 5397). Mr. O'Brien endeavored to test the accuracy of the witness's figures on the same exhibit for the 99th Street plant for January, 1918, but the Master would not permit this, giving as a reason for his refusal that a sufficient test had been made of the correctness of the figures by the witness's *approximation* of the figures for 1906 (Rec., pp. 5398, 5399). This illustration of the method of "proof" allowed by the Master is typical of the hearsay character of much of complainant's testimony. The payrolls upon which Mr. Woods based the figures embraced in Exhibit 351 were not in evidence as the result of testimony given by any witness who identified them and swore to their genuineness and accuracy. The Master arbitrarily ruled that by the admission of the books, all of the underlying data upon which the books were based were in the record.

> "Q. Mr. Woods, in preparing the hypothetical figures on Exhibits 353 and 354 for Identification, did you have before you the costs of making gas in the complainant company and all the allied companies? A. I knew the cost and knew their operation; *knew the coal* and oil that they were using, the prices of material which obtain at the present time and based upon——
>
> Q. Did you, when you sat down to make up these figures, have before you the details of the cost of making water gas and coal gas of the complainant company and its affiliated companies for any particular period or any periods? A. I did not have it before me. I had the cost of the various companies" (p. 5503).

We shall show presently that Mr. Woods did not know how much coal the complainant and its subsidiaries used.

He admitted that he knew nothing about how much coal was actually delivered to or used by the companies, except what he obtained from the records (Rec., pp. 5606 to 5611).

That the witness had no personal knowledge of the figures which he included in the various exhibits which he prepared, but obtained his information either from some employee or from the books of the complainant or one of its subsidiaries, is apparent from the following:

> "Q. Did you have before you when you were making these figures the costs of gas separated into the several items set forth in these Exhibits 353 and 354 of the Astoria Company? A. I probably knew what the Astoria figures were at that time, yes. *I had access to the Astoria figures*" (Rec., pp. 5386, 5387).
>
> "Q. If some one seeking to verify these figures for labor handling, coal gas costs, 2 cents a thousand cubic feet, goes to the Central Union Gas Company or the Astoria Company, where would he go to find the verification of your figures? A. *To the payrolls*" (Rec., p. 5555).

We give a few additional illustrations of the hearsay character of Mr. Woods's testimony:

> "Q. Who measures the oil that you go by; you do not, do you? A. I do not.
>
> Q. Whose word do you take for that? A. *The superintendent in charge of the station.*
>
> Q. You get that information always, don't you, from the superintendent? A. I do.
>
> Q. As to how many gallons he uses for a ton, and all that? A. That is right" (p. 4881).
>
> "Q. The drip oil, where does that come from out of the machine? A. The drip oil comes from

the holder from the mains on the street. * * * The only places where we have drip oil at the plants is what drops out of the holders.

Q. You did not measure any of that? A. No, I did not measure it, but I——

Q. you procured your information from the superintendent? A. *Through the superintendent*, and it is my knowledge of what is going on *and the records*, and I know the amount that is accumulated" (p. 4891).

None of the superintendents was called to testify to the information which Mr. Woods says he obtained from them.

If Mr. Woods intended to convey the impression that he had personal knowledge of the amount of drip oil, he was not entirely candid. He visited the plants with more or less frequency, and therefore he could not have actual knowledge of how much drip oil there was during his absences.

"Q. Where did you get your information from, for renewals and replacements? A. *I got that from the accounts of both the Standard and Consolidated Companies. I looked up the records to see what the renewals had been for a number of years.*

Q. Aside from that, you had no knowledge of it? A. *That is the only way you could determine what the withdrawals had been.*

Q. *To get it from the books?* A. *Absolutely*" (p. 4946).

"Q. Referring to Exhibit 351, where you have made a comparison of hourly rates of week-day wages paid by the complainant at its 21st and 99th Street water gas plants, were these figures taken directly from the manufacturing books of those two stations? A. No, not at all.

Q. Taken from the payrolls? A. Payrolls or time books. * * * They were taken from the plant payrolls or plant time books * * * in each instance" (p. 5217).

"Q. Have you got or are you able to state as of any day covered by the years in this manufacturing book for the 99th Street station, from January 1, 1916, down to date, how many men there were at any particuar time working in that plant? A. I have a record here during the week or a certain period. * * *

Q. It covers what time? A. During the week of January 1, 1918. * * *

The Master: Do not waste any time checking with that book.

Mr. O'Brien: The witness already admitted this book does not correctly state all the men that work there. * * *

Q. How many men handling material, what they call handling here in the manufacturing book? A. Just what they were doing; there were 16 laborers doing it that week, but just what they were doing I do not recall now.

Q. Where did you get that information from? A. *Right from the time books*" (pp. 5312, 5313).

"Q. Where did you get the figure for repair handling material, miscellaneous labor, indexers, governor house men and watchmen; from the same source of information? A. I did. * * * I got it from the payrolls * * * (p. 5388).

"Q. Did you use the time books of the works? A. I did.

Q. You had to get them, did you not, to get all the data that you needed to make this (Exhibit 351) up? A. Yes, I did" (p. 5403).

"Q. Why did you go to the time books? A. Because it was the original source of information * * * as to the number of men employed and paid; their rates of pay" (p. 5404).

"Q. Did you have the time books for the year 1914 for January? A. For January, 1914, *we used the payroll book*" (p. 5406).

Q. Who made the separation for the purpose of this tabulation that you have given here in Exhibit 351, of what work was done for Consolidated

Gas Company and what work was done for other companies? A. This segregation as of this date was based upon a percentage * * * as of the date this was taken; the percentage or the number of men employed by the Consolidated Gas Company was based upon a percentage applicable to the year. * * * They were taken from the payroll, but in so far as a particular payroll was concerned, it said in 1906, 43 per cent. of the number of men on the payroll were working for and in the interest of the Consolidated Gas Company, the balance of the men being employed for and in the interest of other companies. * * * The 43 was the percentage for 1906 and 41 in 1914; 51 in 1918; 51 on January 1, 1919, and 51 on September 20, 1919. * * * The percentages were taken off the total payroll for the year, based on the ratio in which the Consolidated Gas Company was doing work for other companies. * * *

Q. Who told you to use those percentages? A. *I got those figures from the Accounting Department* to find the expenditures of the street main department and how much of their expenses was for other companies.

Q. Why did you not get it from Mr. Simpson's department? A. I worked in conjunction with Mr. Simpson. The information was gotten, however, from the Accounting Department * * * from Mr. Bischoff. He is one of the chief accountants in the Accounting Department of the complainant company. * * *

Q. Did the same Mr. Bischoff give you the percentages to use for the other companies? A. He did" (pp. 5457-5460).

It may be urged that the criticism of Mr. Woods' testimony, in so far as it relates to Exhibit 351, has no value, because of the Master's statement that he would make no finding based on said exhibit (p. 5417). We do not, however, understand that the Master rejected all of Exhibit 351. He merely refused to take the figures which Mr.

Woods included in Exhibit 351 as the costs of commercial department expenses and general officers and administration expenses.

Mr O'Brien: Your Honor, on this question of the distribution items, as they appear upon the several exhibits that were introduced since the witness Woods went on the stand——

The Master: There is no proof before me other than the proof which appears in the books themselves as to the cost of distribution.

Mr. Ransom: Now your Honor is in error. There were certain items of distribution concerning which you permitted the witness to testify.

The Master: What was that, replacements?

Mr. Ransom: No, certain of the figures under the cost of distribution.

The Master: What are they?

Mr. Ransom: Well, with respect to mains, I think everything except commercial department expenses.

The Master: Yes.

Mr. Ransom: And general officers and administration expenses.

The Master: Yes.

Mr. Ransom: So far as the engineering side, the matter of the expenses in connection with mains, services and the like, you permitted proof of the cost of distribution.

The Master: Well, what I had in mind was this: * * * You have certain items that his experience has shown that you use so much coal and so much oil and so much for this iron scrap and water and labor and things of that sort but when it came to costs, renewals and replacements, I let him state, but when it came to the cost of the clerical hire, executive officers and commercial branches and all of those things that enter into this 19 cents for distribution, I would not allow it. * * * I have allowed everything I thought this witness knew anything about; the labor to paint the holders, to keep the holders in condition, and all those things. * * *

Mr. Ransom: On page 1656 and following, your Honor, over the defendants' objections, allowed Mr. Woods to testify to the cost of distribution.

The Master: Let me see it.

Mr. Ransom: Down to "commercial expenses."

The Master: Well, I know I cut out the commercial expenses. Allowed this witness to state the cost of repairs to mains, services, meters, appliances and miscellaneous repairs. I let him state that.

Mr. Ransom: You also allowed him to testify to work on the consumers' premises, but when I came to commercial expenses and administrative and general office expenses, you said, "No further."

The Master: That is my recollection of it (pp. 5143-5146).

As a matter of fact, Mr. O'Brien's motion to strike out Exhibit 351 on the ground that "it now appears from the testimony of the witness, Woods, that he did not have the source of original entry, original information that is, the time books, in making up" said exhibit, was denied (p. 5436). Later, Mr. O'Brien renewed the motion to strike out Exhibit 351 upon the ground among others, that it "*does not reflect the facts as shown in the original source of information*" (p. 5638). This motion was also denied. The same motion was repeated at a subsequent stage of the trial upon the ground, among others, that there was no foundation for Mr. Woods' "hypothetical figures." Again the motion was denied (p. 5701).

On March 22, 1920, at which time the taking of testimony had been completed and the case closed, Mr. Chambers moved to strike out Complainant's Exhibits 351 and 352 "on all the grounds stated at the time they were offered." The motion was denied, and Mr. Chambers duly excepted (p. 15422).

The Master's ruling simply emphasize our contention that he did not reject any part of Exhibit 351 because the

information therein contained was not based upon Mr. Woods' personal knowledge, but because the witness had not been qualified to testify to certain items as, for instance, commercial expenses and general office administration expenses.

> Q. Will you state the number of men in each one of those stations embraced within the number of 410 opposite January, 1906, under the grouping, Shop Department? * * * A. No I have not got it.
>
> Q. Is there any paper with you in court that will refresh your memory so you can tell us the number of men in each station embraced under that number? A. There is not.
>
> Q. I ask you the same questions as to January, 1914, January, 1917, 1918, and September of 1919? A. No, I haven't them segregated.
>
> Q. Haven't you preserved them in your files where they may be available for the defendants' investigators, the various figures that make up these details, under the title, 'Shop Department,' for this purpose? A. Yes, probably * * * I think we have that information.
>
> The Master: Isn't it in your payroll books?
>
> The Witness: Yes, it is all in the payroll books * * * or time records" (p. 5442).

"Q. Have you brought here any data that will enable you to segregate the amounts of labor under the grouping 'Shop Department,' into those that are used in connection with 'Street and Mains Department' and those that are used on meters and those that are used on repairs to appliances and the setting up of appliances? A. I have not" (p. 5448).

"Q. Have you made any separation of the data that was the basis of 351 that will set apart those who were engaged on appliances, either repairs, or setting them up in the new from the other classes of labor embraced under that group? A. I have not" (p. 5449).

"Q. Who furnished you the data from which you made up this grouping, Shop Department? A. Through the superintendents of the various shops. * * * They brought in their time records from which this information was taken in my office" (p. 5450).

"Q. Have you gone over the cost of distribution of the complainant company for the last year? A. I have.

Q. Do you have in mind now the cost of distribution as shown by the books of account of the complainant company for the year 1918? A. I have" (p. 5473).

To allow Mr. Woods to give hypothetical figures of the number of pounds of coal, the number of gallons of oil and the number of men required to make a thousand cubic feet of gas was an improper and incompetent way to prove the facts.

The situation in the instant case is comparable with that in

Carlson v. *Oceanic Steamship Co.*, 109 N. Y., 359,

which was an action against the steamship company for the loss of a trunk and its contents, the baggage of a Swede, emigrating to the United States. Plaintiff testified to the contents of the trunk, showing they were such as under any circumstances would fairly be called baggage. Defendant called as a witness an inspector of customs at the port of New York, who, after testifying that he had in hundreds of instances examined the baggage of emigrants from Sweden and Norway and could give a fair idea of the value of the ordinary baggage of those emigrants, was asked to state what, in all his experience, was the actual value of the baggage he had ever seen in any one trunk from those countries in the custody of any one emigrant. This was objected to and excluded. Held, no error.

The rule is that where the actual facts can be proved and they are of such a nature that men of ordinary intelligence and experience can draw the proper inferences therefrom, expert or opinion evidence is not admissible.

Ferguson v. *Hubbell*, 97 N. Y., 507;
Van Wycklyn v. *City of Rochester*, 118 N. Y., 424;
Pearce v. *Stace*, 207 N. Y., 506.

There is no competent evidence of the amount of coal actually used by the complainant.

Neither Mr. Woods nor any other witness gave any definite information of the amount of coal used by complainant at any of its plants for any stated period.

Mr. Woods testified:

"Q. • • • Who takes stock of the coal? A. *The Superintendent*" (p. 5333).

"• • • We make the calculations, whatever the shape may be, for the purpose of determining the cubical contents that the coal occupies.

Q. Do you know the particular man at either station that does that? A. I think Mr. De Castro does that with his assistant.

Q. Who does it at 21st Street? A. I don't know. • • • I should say that the Assistant Superintendent had charge of that plant, checking that up" (p. 5334).

Neither Mr. De Castro nor any of the Superintendents referred to by Mr. Woods was called.

Q. Does not the manufacturing record show how much coal and other material is used during a run, during which a certain amount of gas is made? A. No.

Q. Isn't there any way of checking up that weight? A. Per run?

Q. Yes. A. No" (p. 5512).

"Q. You have handed me two cards, one entitle 'Generator fuel for year 1918'; another 'Generator fuel for 8 months 1919.' I will ask you in whose handwriting those cards are? A. They were made by me. The handwriting is Mr. Viebrock or Mr. Rogers, I have forgotten which. * * * I had them made up.

Q. Did you tell them to get it up? A. I got it up with them.

Q. Where did you find the figures representing 'Made' at the several stations of the several companies? A. In my department. * * * In the engineering monthly reports.

Q. All the engineers of the sub-companies, Astoria, New Amsterdam, Standard, Mutual, 99th Street and 21st Street, turn in monthly reports to you? A. *Yes. I had access to those figures.* * * * *They are turned in to my department.* * * *

Q. Will you state where Mr. Viebrock and Mr. Rogers derived the figures showing coal in tons? A. *On the engineering records.* * * *

Q. When you read off a minute ago, the figures showing pounds of generator fuel, you used in 21st Street station, it was predicated upon a total used of 95,311.64 pounds? A. *I will have to refer to the memorandum.* 95,311.54 tons and 2,510.71 tons of coke.

Q. Who made these computations upon these two cards?

The Master: I think he has answered that. * * * Viebrock and Rogers and himself. * * *

The Witness: Yes.

Q. *You don't know how much coal was delivered or actually used by these companies, do you?* A. * * * *Except by the records. I did not actually see the coal.* * * *

Q. But beyond the fact that these reports are produced for you and these figures worked out by them (Viebrock and Rogers) from sources that

you know of, you don't know their correctness by personal inspection of your own? A. I firmly believe they are correct.

Q. *But you don't know it by personal inspection of your own, or of your personal knowledge?* A. *You mean as to making calculations of their own books? No, I never did*" (pp. 5606-5611).

None of the persons referred to by Mr. Woods was called.

Lewis B. Gawtry, one of the vice-presidents of the Consolidated Gas Company in charge of the Purchasing Department, was called by the complainant and testified to the coal contracts made by it. Mr. Gawtry *gave no testimony concerning the actual amount of coal purchased or delivered.*

Mr. Gawtry also testified that the complainant purchased coal for the other companies affiliated with it, except the New York Mutual.

The Master's finding as to the prices of anthracite generator fuel and bituminous gas coal as of October, 1919, are based upon the testimony of Mr. Woods (pp. 4673-5517). It appears, however, that Mr. Woods obtained these prices "from the Purchasing Department and from our books" (p. 5517). There is therefore no competent basis for these findings. In fact, the Master stated that he would not take Mr. Woods' testimony as to prices (*id.*). Moreover, it is impossible to reconcile the Master's findings with his statement that he would not base any finding upon the extraordinary conditions caused by the war (p. 3437).

The record is barren of any competent evidence of the amount of gas made and sold by complainant and its allied companies.

A tabulation of the amount of gas sold by complainant during 1918 and eight months ended August, 1919, was taken from complainant's books by Mr. Teele (Exhibits 364, 365).

The only other attempt made by complainant to show the amount of gas manufactured by it and its subsidiaries was through the testimony of Mr. Woods. The only information which Mr. Woods appeared to have upon the subject was derived from the same books from which Mr. Teele testified his tabulation was made.

> "Q. You take the Standard's word for their make to you? A. *We get a record of the operations.*
>
> Q. You do it from their books? A. *We do it from the books.* The Standard I am chief engineer of, so I know what they do. We get their meter indexes and record what they do.
>
> Q. The make-up of the Central Union that goes into that make (main?) how do you find out how much it is? A. *I take their records* and I examine their plant and meters, go through to see that it is done. That is part of my job.
>
> Q. How about the contribution made by the other companies? A. The same thing applies.
>
> Q. *You take what their records show they made?* A. *What they made, yes; what they send out.*
>
> Q. You don't do any of that; your Accounting Department does? A. *I don't do it, no.*
>
> Q. Can anybody figure this out, unless they do find out from these other companies and go into their books? A. What?
>
> Q. *They cannot find out unless they examine the books of these other companies?* A. *Yes, you have got to examine their books. You have got to*

find out what their sales are and so forth. The question of what is unaccounted for, you have got to treat the companies as a whole, and in that respect is no different from any other company; except they take the total make and you get the unaccounted-for of the combined companies (pp. 4751-3).

Q. Mr. Woods, where did you get your figures for the maximum day's send-out of the Consolidated? Is that for the Consolidated Company only, for 1906?

[NOTE: These and the following questions refer to a number of statements prepared by Mr. Woods, purporting to show the amount of gas made by complainant and its subsidiaries in every year since 1906.]

A. Yes.

Q. Where did you get that figure from? A. The foundation is gotten from the send-out of the system in the Engineering Department.

Q. Well, it is the whole system and where you got it from? A. The whole system, yes.

Q. Not the Consolidated? A. That is right.

Q. Where did you find any such figure as that? A. That is a calculated figure which has been testified to, and that is the only means we have of determining send-out of any particular company, the means based upon the ratio of the sales of that company as applied to the system.

Q. And there is not any way, is there—that is what I thought—of finding out exactly what the send-out is of the Consolidated Gas Company except by somebody making a computation or figuring it out in the manner you have indicated? A. That is right.

Q. Is that true of all of those different years? A. That is right.

By the Master.

Q. And it is true as to those exhibits in evidence, where it shows the send-out? A. That is right, your Honor.

Q. And of separate companies? A. That is the only way we have of doing it.

By Mr. Chambers.

Q. Who figured this out, these figures here of the maximum days? A. I figured many of them out.

Q. Did you figure the one in 1906 that you gave? A. Yes.

Q. Between yesterday and this morning? A. Yes.

Q. What did you take to figure it out; show me how you did it? A. Well, I have not the figures with me. It is simply the ratio of sales, as applied to 1906, to the total sales which figures whatever the percentage may be, 59, 60, 61 or 62, I have forgotten what the figure may have been, times the send-out of the system, gives the send-out of the Consolidated Gas Co.

Q. You mean you took the sales of the various companies? A. That is right.

Q. *You had to assume that that was correct?* A. *Yes.*

Q. *You had to assume that the sales of the New Amsterdam were correct?* A. *Yes.*

Q. And the sales of the Mutual were correct? A. Right.

Q. And if their sales were incorrect, why, this would be all wrong? A. It is based on the ratio of sales. It is the only method of the determining the send-out of any company.

Q. To have this correct you would have to examine the books of the New Amsterdam, and the Mutual, and see what their sales were? A. *I examined the records to find what their yearly sales were*" (pp. 15378-80).

VI.

There is no competent proof of complainant's distribution expenses.

The Master took his figures from Teele's tabulations without change. In his opinion, he gives "the entire cost of distribution for 1918 at 19.78 cents per thousand cubic feet of gas sold; for the first eight months of 1919, 21 cents and for the twelve months ended October 31, 1919, 22.09 cents" (Rec., p. 57-a).

After making deductions from certain items amounting, for 1918 to $317,808 and for 1919 to $215,542, Judge HAND found the distribution cost for 1918 $.1841 and for 1919 $.1978 (Rec., pp. 166-a, 167-a).

Complainant assigned no errors of Judge HAND's deductions. So far as complainant is concerned, they are, therefore, undisputed and uncontested.

As to all of complainant's distribution expenses, defendants' contention is that the evidence in support of them is fundamentally defective.

We shall discuss a few of complainant's distribution costs for the purpose of illustrating the incompetent character of the evidence in support of all of them.

The most striking example of defendants' contention appears in complainant's evidence relating to its charges for meter and installation work; work on consumers' premises; repairs to street mains and services; repairs on buildings (branches, street department shops, etc.); repairs on tools (street department shops, etc.); and repairs on gas appliances. The only evidence offered by complainant in support of most of these items is its books. In some instances it supplemented the books by two witnesses, Brundage and Teele, who admittedly have no personal knowledge of the transactions. The books

do not show the necessity for or the reasonableness of any of these charges. They do not disclose whether the number of men employed or the amount of material used was necessary to do the work required.

Mr. Teele testified:

> "I have relied upon the indorsement of the engineering department of the company as to whether the materials purchased were for repairs or construction purposes" (Rec., p. 6219).

Distribution Superintendence, Supplies and Expenses.

1918	$323,233.01
1919 (8 months ended August 31, 1919)	211,510.65

Whenever reference is to 1919 only the first eight months of that year are included.

The employee in charge of complainant's distribution department was not produced.

With the exception of its books, the only evidence offered by complainant was that given by Mr. Teele.

Complainant's business includes many activities besides the manufacture and distribution of gas. Its general officers devote much of their time to those other enterprises, but complainant made no effort to show the amount of time spent by its general officers on its gas business.

Mr. Teele admitted that he did not have any "way of knowing whether the men who rendered services for these salaries shown on Exhibit 364 devote all their time to the distribution of gas" (Rec., p. 6276). His cross examination also developed the interesting fact that while he had classified all of the expenditures under salaries of general offices, engineering department, shown by the payrolls as distribution expenses, the only tests he made of the payrolls was to examine, for the months of January and December, *the time cards of the hourly wage men* (Rec., p. 6285).

Repairs to Mains and Services.

1918	
Repairs on street mains.....	$118,310.47
Repairs on services.....	42,512.98
Total	$160,823.45
1919	
Repairs on street mains.....	$77,098.89
Repairs on services.....	26,860.15
Total	$103,959.04

Complainant's testimony in support of these items is pure hearsay.

Complainant does all of the repair work on mains and services for itself and all of its affiliated companies. It called none of the men in charge of this work to show the necessity for or the reasonableness of the amounts expended for labor and material.

It called its gas engineer, Mr. Woods, who submitted a tabulation alleged to have been taken from complainant's books. Mr. Woods had no personal knowledge of any of the details. On cross examination, it developed that his tabulation was prepared after talks between himself and several members of complainant's accounting department, and that the division of 49 and 51 per cent. between complainant and its affiliated companies was obtained from Mr. Bischoff, one of complainant's bookkeepers, who was not produced (Rec., p. 5459; p. 5461).

As to the charges to other companies for pipe, etc., Mr. Brundage testified:

> "Q. Are these other companies where you have laid mains or performed work * * * charged for interest during construction of those mains, or

any interest upon expenditures from the time incurred until the company pays for the main? A. No.

Q. That is regardless of how long you carried that on your books? A. I do not recall that we ever charged interest on any main construction.

Q. That is, you might carry the payroll for six months and make no charge for the interest? A. We never charged them interest that I can recall.

The Master: Why shouldn't they be charged interest, Mr. Brundage? It is practically money you loan to them or advance for them. Why shouldn't they pay interest?

The Witness: It might have been done but it was not done.

Q. Well, it should have been done, shouldn't it? A. It is not for me to say" (Rec., p. 5784).

No one was called by complainant to justify its failure to charge interest. Nor did complainant offer any testimony to show why, in the case of repair work done by it for other companies, it charged only five per cent. for overhead as compared with 15 per cent. which it charged to contractors to whom it sells the pipe for repair work (Rec. pp. 5785, 5786).

Judge Hand's refusal to make any deduction from the Master's finding for repairs to street mains appears to be wholly irrelevant. He stated:

"These were done by the company for itself and all other companies. No profits are included, and the item should be taken as it reads" (Rec., p. 163-a).

It is respectfully submitted that the learned Judge should have refused to confirm the finding because of complainant's failure to prove the reasonablenesss of the charges.

Repairs of Meters and Gas Appliances.

1918	$322,539.60
1919	265,116.55

The foregoing amounts were taken by the Master without change from Teele's tabulations from the books of the Standard Gas Light Company. These books were not offered in evidence or even produced by complainant.

All repairs to meters and gas appliances are made by the Standard Gas Light Company, whose employee, Mr. Curnine, is in charge of that work. Mr. Turner, acting general superintendent of the Consolidated Gas Company meter shop, passes upon the charges. Neither Mr. Curnine nor Mr. Turner was produced.

The tabulations alleged to have been made by Teele from the books of the Standard Gas Light Company are wholly insufficient to prove the necessity for or the reasonableness of these repair charges.

Complainant offered no testimony to show the extent of or the necessity for the repairs, or the amount of material used therein or that the number of men engaged in making the repairs or in supervising the labor employed thereon were required either for the actual work of repairs or the supervision thereof. In the absence of such testimony, it is impossible to determine the reasonableness of the sums alleged to have been expended for these repair charges.

The only testimony which complainant offered in addition to the Teele tabulations was that of Mr. Brundage.

Mr. Brundage testified:

> "Q. What inspection is made, and how frequently, of the accounts and expenses to the Standard Gas Company, so far as the shop is concerned, where appliances are repaired and meters are repaired?

Mr. Ransom: I object to the question.

The Master: Overruled.

The Witness: *We are not interested.* The Standard agrees to do certain work.

Q. Won't you answer my question? A. I will, very gladly.

The Master: He has already answered it.

Mr. O'Brien: I did not ask him to tell me whether they were interested. I asked him whether there was any investigation made.

The Master: The Master understands the answer to be that they do not, they are not interested, and they do not.

Mr. O'Brien: I understand your Honor rules that I may not ask the witness about the account that he has referred to?

The Master: Ask your next question, and go on.

Q. Will you turn to that account you just referred to, covering repairs to meters and appliances?

The Master: For what purpose?

A. At the shop of the Standard Gas Light Company, in the operating ledger.

The Master: For what purpose?

Mr. O'Brien: For the purpose of showing the method of OK-ing and investigating these bills.

Mr. Ransom: I object to the question.

The Master: Objection sustained.

Mr. O'Brien: Exception.

Q. Do all the bills for these repairs come through one man in your employ? A. They all come to me, properly approved, and are passed to the accounting department, where they are classified, put through the accounting department routine, posted in the ledger, transferred to the treasurer's department for payment.

Q. Will you name the individual who is charged with the obligation of inspecting these bills and passing upon them?

The Master: As to meters.

The Witness: They are passed on in the first instance by the Consolidated general office meter department.

The Master: And appliances?

The Witness: Yes, sir.

The Master: Both?

The Witness: Both passed on by the same people.

The Master: What is the name of the man?

The Witness: Mr. Turner, our acting general superintendent of meter shops, passes upon the charges of this work performed in the way of repairing meters and repairing appliances.

Q. And he is still with the company? A. Yes.

Q. Been with the company a number of years? A. Yes.

Q. Available as a witness? A. Yes, he is certainly here" (Rec., pp. 2983-2985).

As to these items, Judge HAND held:

"*Repairs to meters and appliances.* These are not done directly by the company but by the Standard Company, a subsidiary whose stock is owned by the plaintiff. They are billed to the plaintiff and all items are scrutinized and checked by one of its officials. Presumably the charges include a profit based upon the assumption that the companies are independent, for so the accounts read. In the case of mains and services, the plaintiff does the work for the other companies and charged a profit of 5 per cent. I have not been able to find what the Standard's profit is on this work, but it is scarcely necessary in the case of so small an item. If I assume that the profit was 10 per cent., as it is on the sales of gas between companies there would result a deduction of twenty-nine thousand,

three hundred and twenty-two dollars for 1918 and twenty-four thousand, one hundred and twenty dollars for 1919. I shall so take it" (Rec., pp. 162a, 163a).

With submission, we respectfully insist that no branch of this case should be decided upon inferences or conjecture. The learned Judge should have refused to confirm the Master's finding upon the ground of complainant's failure of proof.

Promotion Expenses, Gas Appliance Department—Promotion Expenses, Utilization Department.

These items are substantial in amount. In 1918 they aggregated $206,074.90 and for the first eight months of 1919, $142,599.95.

On direct examination, Mr. Carter testified that complainant's gas appliance department is a division of its commercial department and is the sales organization of the company (Rec., p. 8367).

On cross examination, Mr. Carter admitted that, although he had charge of complainant's accounting department, its accounts had never been arranged in such a way as to show all of the expenses incurred in the appliance business so that at any given time there might be determined the cost of appliances, of the handling and renting thereof, and of the selling, inspection and installing of them and the returns to the company from the rentals. He was then asked why the company had never set up accounts separately covering all expenditures involved in its gas appliance business and its revenues therefrom. Although no objection was made to this question by complainant, the Master declined to allow the witness to answer, despite the fact that defendants' counsel directed the Master's attention to the ruling

made by this Court in the Minnesota Rate Cases (230 U. S., 352, 466), where it was held:

> "While accounts have not been kept so as to show the relative cost of interstate and intrastate business giving particulars of the traffic handled on through and local trains, and presenting data from which extra cost as there may be of intrastate business may be suitably determined, it would appear to have *been not impracticable to have such accounts kept or statistics prepared at least during* test periods properly selected. *It may be said that this would have been a very difficult matter*, but the company having assailed the constitutionality of the state acts and orders, *was bound to establish its case* and it was *not entitled to rest on expressions of judgment* when it had it in its power to present *accurate data* which would permit the Court to draw the right conclusion."

There has been no separation made in the accounts of the company of the labor and material upon which money was spent by the company in connection with these appliances. The testimony indicates that part of the time of the setters and fitters, the foremen, the stock clerk and assistant, the bookkeepers, the telephone operators, the canvassers and solicitors, and the general officers of the company were given over to this merchandising. The testimony further shows that some of the employees' time, like the sales manager, the purchasing agent, *et al.*, was entirely given to this business. The record further shows that advertising expenses, rental of branch offices, salaries of managers and assistant of branch offices, were incurred because of merchandising. The evidence shows that large amounts of freight charges were paid out on account of the business conducted in gas appliances by the complainant; the stable expense account, a large portion of which was incurred in con-

nection with the merchandising, was not properly analyzed to show what portion of the expense would be properly chargeable to this account. So that the whole story is confusing and enshrouded in doubt as to the carrying on this business, which is not essentially a part of the gas-making industry. This question of merchandising is a very important one in this case, particularly in view of the fact that there was a large volume of business in connection with it. Complainant offered no reasonable analysis of the cost of conducting this business.

Having failed to segregate the expenses of its gas appliance and utilization departments, it cannot fairly be said that there is any safe basis for the determination that those expenditures are fair and reasonable, or whether the departments were run at a gain or loss.

Defendants were not allowed to show by Mr. Carter to what extent complainant's electric companies spent money to develop their business, the Master apparently believing that defendants were endeavoring to ascertain the profits of the electric business (Rec., pp. 8598-8605). And see Master's opinion (Rec., p. 47a). In his rulings and in his opinion on this branch of the case, the Master labored under a misapprehension. What defendants should have been permitted to show was that the company was sacrificing its gas business to the advantage of the electric business carried on by certain of its subsidiaries.

Automobile Expenses.

1918	$146,111.75
1919	95,507.11

Mr. Carter attempted to justify these charges but when cross-examination developed that whatever information he had on the subject was hearsay, the Master

directed that his testimony be stricken out (Rec., pp. 8855-7).

Henry V. Middleworth, in charge of complainant's garage department, was not called by complainant but was put upon the stand and examined by counsel for the defendant Swann. We have discussed elsewhere the Master's conduct in shutting off the examination of this witness (Point I). It was, however, made to appear from the few answers Middleworth was permitted to give that he kept no record of who used the automobiles or for what purpose they were used (Rec., pp. 13154-5). The record, therefore, is barren of any evidence from which the inference can fairly be drawn that the number of cars in use by complainant is reasonably necessary.

The Master indicated his sentiments about complainant's exorbitant automobile charges in his usual blunt fashion:

> "That is the feeling I have, that twenty-nine cars is an unusual number, and *without explanation, I think it is an improper number*" (Rec., p. 8806).

Judge HAND refused to make any deduction from these charges, upon the ground that it was incumbent upon defendants to show that complainant's officers had abused the discretion vested in them and used or caused to be used more automobiles than were reasonably necessary (Rec., p. 165a). It is respectfully submitted that the burden of proof is complainant's, and that having failed to sustain that burden, its automobile charges should be disallowed.

Uncollectible Bills.

1918	$95,330.22
1919	47,535.08

Judge HAND has made no reference to these items. He probably acted upon the assumption that they were not challenged by the defendants. This was undoubtedly due to the fact that through inadvertence none of the defendants mentioned the items in their briefs, and it was so stated on the argument before Judge HAND.

These items should not be allowed.

By Section 63 of the Transportation Corporations Law of the State of New York complainant is authorized to require

> "* * * every person to whom such corporation shall supply gas * * * for lighting any building, room or premises, to deposit with such corporation a reasonable sum of money according to the number and size of lights used or required or proposed to be used, for two calendar months by such person and the quantity of gas * * * necessary to supply the same, as security for the payment * * * or compensation for gas consumed, to become due to the corporation * * *."

Unless the deposit be made as required by the above section, complainant may cut off the supply of gas to the consumer or refuse to serve him.

Transportation Corporations Law, Sec. 65.

The only evidence which complainant offered of the amount of its uncollectible bills is its books. It should have gone further and shown, if it could, that the extraordinary protection given to it by the statute against non-payment was insufficient.

Miscellaneous General Expenses.

1918	$62,944.94
1919	84,829.91

Included in the foregoing is an item, "Miscellaneous, $27,280," for 1918, and for 1919, $8,654. From the 1918 figure Judge HAND has deducted $10,000, and from the 1919 figure, $4,500 (Rec., p. 166-a).

It is respectfully submitted that the items included in "Publicity Expenses," amounting to $10,060.57 in 1918, and to $8,630.82 in 1919, should be disallowed because not proven. Many of these so-called "publicity expenses" were alleged to have been incurred by R. E. Livingston, complainant's publicity agent. Mr. Livingston testified that it has been his custom to destroy the vouchers for his expenses "every week for the last fifteen years" (Rec., pp. 10770-1).

There should also be disallowed the items, "Meeting Fees,"

1918	$13,941.12
1919	9,456.00

as there is nothing in the record to indicate the extent to which these fees are properly chargeable to complainant's gas operations.

New York City Real Estate Taxes on Astoria Property.

Judge HAND allows $205,212.90 and adds a tax of $75,000 for the new 30,000,000 Astoria unit (Rec., pp. 169-a, 170-a). If we are right in our contention that the Astoria plant and the new unit should not be added to the rate base, it necessarily follows that these items should be excluded from complainant's distribution expenses.

Charge Made to U. S. Government.

It is respectfully submitted that the Court below erred in not crediting the 1918 distribution expenses with the sum of $36,782.50, the amount charged the United States Government for officers' services at $150 a day.

Defendants claim that the amount of this item, $36,-728.50, which is for payments and charges in connection with the light oil recovery plants operated at complainant's 21st and 99th Street plants during 1918, should be included in complainant's 1918 revenues.

Mr. Addicks presented a summary (Complainant's Exhibit 344) showing such payments and charges. He testified that the services were rendered by Messrs. Cortelyou, Gawtry, Bradley, Woods, Morris, Brundage, a great many of complainant's employees in Mr. Brundage's and Mr. Bradley's departments, and himself; that the United States Government paid the share of the time of these officers and employees of the company devoted to the toluol plant in lieu of a provision in the contract with the Government that a special organization be effected to do the work for it.

Although the Master's impression that the sum of $36,728.50 had been included in complainant's operating revenues was corrected by Mr. Ransom's statement that it had not, nevertheless the Master took Mr. Teele's figure of 19.78 cents for 1918 distribution expenses without change and without giving any credit for said sum (Rec., pp. 4367-70).

Superannuation.

1918.....	$65,704.22
1919.....	47,361.03

So far as the allowances for superannuation are concerned, it is respectfully submitted that if provision had been made for a fund by contributions from employees' salaries or by the company itself or from both sources, there would be no injustice to complainant's consumers in passing these payments for superannuation. No such provision was made. Mr. Carter testified that "the number of employees on the superannuation payroll is sub-

stantially larger than it was twenty years ago" (Rec., p. 8723). As time advances, the number on the superannuation roll will increase. To approve these allowances is to compel present consumers to pay now for services rendered by employees in the past.

The language of Mr. Justice GREENBAUM in *Kings County Lighting Co.* v. *Lewis, ante,* seems to be peculiarly applicable to the situation here. The learned Justice said:

> "It is commendable to recognize the faithful services of an old employee. Had it been shown that the plaintiff had adopted a policy years before to encourage faithful and efficient service by providing a pension fund for old age or other disability from which employees would be paid, the moneys set apart for that purpose could have been spread over many previous years and not charged against the years when disability existed."

To Judge HAND's deductions from complainant's distribution expenses there should be added:

1918		$317,808.00
Uncollectible bills	$95,330.22	
Publicity expenses	10,060.57	
Amounts charged U. S. Gov't for officers' services	38,728.50	
Superannuation	65,704.22	
Real estate taxes on Astoria property	264,700.15	
Taxes on property not used and useful:		
Block 985, Lots 7, 19, 20..	2,519.04	
Block 952, Lots 29 & 30...	991.20	
West 57th St. building, Block 1028, Lot 38.....	12,980.00	
		491,013.90
		$808,821.90

1919		$215,542.00
Uncollectible bills	$47,535.08	
Publicity expenses	8,630.82	
Superannuation	47,361.03	
Real estate taxes on Astoria property	307,819.63	
Taxes on property not used and useful:		
Block 985, Lots 7, 19, 20..	1,650.86	
Block 952, Lots 29 & 30...	649.60	
West 57th St. building, Block 1028, Lot 38.....	8,506.67	
		422,153.69
		$637,695.69

Nothing definite can be said of how much the deductions on other property not used and useful amount to, for the reason that there is nothing in the record from which to determine what proportion the value of that part included bears to the part excluded. A similar observation applies to the items "Distribution Supplies and Expenses"; "Repairs to Mains and Services"; "Repairs of Meters and Gas Appliances"; "Automobile Expenses"; and "Promotion Expenses, Gas Appliances and Utilization Departments," and "Meeting Fees." Some money was undoubtedly expended by complainant upon these items, but there is no evidence in support of the reasonableness of the charges.

Complainant has an unliquidated claim against the United States because the Government extracted light oils from its gas at the 99th and 21st Street stations during a part of 1918. Mr. Addicks would not deny that the claim may not amount to half a million dollars (Rec., p. 4404). His testimony makes it sufficiently clear that the claim may be so substantial in amount as to affect the result in this case (Rec., pp. 4396-4405).

Federal Tax.

The Master excluded this tax. There was no exception by complainant to the Master's report and, therefore, the matter was not properly before the learned District Judge. In the circumstances, it is submitted that Judge HAND's finding regarding this tax is error. He held:

> "* * * Assuming a capital of sixty-four million dollars without franchises and seventy-two million dollars with franchises and profits at six per cent. or seven per cent. the results are as follows:
>
> | | Six Per Cent. | Seven Per Cent. |
> |---|---|---|
> | Including franchises... | $432,000 | $504,000 |
> | Excluding franchises.. | 387,000 | 448,000 |
>
> On a spread of twenty billions, these figures would become for each one thousand cubic feet of gas as follows:
>
> | | Six Per Cent. | Seven Per Cent. |
> |---|---|---|
> | Including franchises... | .0216 | .0252 |
> | Excluding franchises... | .0192 | .0224" |
>
> (Rec., pp. 170a, 171a.)

It follows that Judge HAND's determination in percentages of the possible earnings of the complainant, upon the four different hypotheses he assumed, is erroneous. These percentages were calculated by him on earnings from which he had deducted 10 per cent. to pay the Federal Income Tax (Rec., p. 182a).

VII.

As the complainant has utterly failed to show that its purchases of oil were reasonably, prudently and economically made, the amounts alleged to have been paid by it for oil should not be allowed in its operating expenses.

In *Kings County Lighting Company* v. *Lewis, et al., ante,* GREENBAUM, *J.*, speaking of certain of plaintiff's contracts for the purchase of oil, the reasonableness and prudence of which were attacked by defendants, said:

> "It may be assumed that the contract of 1914 was made in good faith. But the true test in a rate case for determining the cost of the oil for 1916 should be the price at the time when in the usual course a gas manufacturing concern would be expected to purchase the commodity for that year and not at high prices prevailing in 1914. If the company chooses to speculate or take its chance in making such a contract, the loss should fall upon it and not the public (*Ames* v. *Union Pacific RR.*, 64 Fed. Rep., 165, 177; *Stanislaus* v. *San Joaquin C. & I. Co.*, 192 U. S., 201; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 144 Iowa, 428, 451)."

All of complainant's oil contracts were made with the Standard Oil Company of New Jersey. These contracts, the prices paid, and the quantities are as follows:

> November, 1905, covering the intervening period to January, 1909, 255,000,000 at 4.29 cents a gallon.
>
> From January, 1909, to December 31, 1910, complainant purchased all its oil at current prices, 3 cents a gallon and 3.75 cents a gallon.

January 11, for the year 1911, 81,000,000 gallons at 3 cents a gallon and 3.75 cents a gallon.

The 1911 contract contained an option, which the complainant exercised, to cover complainant's requirements for the years 1912 and 1913 at the same prices.

July, 1913, for the 1914 supply, 105,000,000 at 5.035 cents a gallon.

July, 1914, for the period between August 1, 1914, and December 31, 1916, 275,000,000 at 3.035 cents a gallon.

November, 1916, for the 1917 supply, 112,000,000 gallons at 5 cents a gallon, with a slight increase according to station used.

December 4, 1917, for the 1918 supply, 122,000,000 gallons at 6.5515 cents a gallon, with an increase according to station used.

December 18, 1918, for the 1919 supply, 122,000,000 gallons at 7.5721 cents a gallon, which was subsequently increased to 7.5821 cents a gallon on account of added transportation charges.

The contract made December 18, 1918, was on March 28, 1919, modified. By the terms of the modification the oil company delivered 82,000,000 in the period between April 1, 1919, and December 31, 1919, at a decrease in the price of 1½ cents a gallon.

The contracts made for the purchase of oil were for deliveries to the complainant and all its affiliated companies, with the single exception of the New York Mutual Gas Light Company (p. 3778). These contracts were with one company only, to wit, the Standard Oil Company of New Jersey.

The purchases of oil, the manner of purchase, and the negotiations which were had in connection therewith, are detailed in the testimony of complainant's witness, Walter R. Addicks.

Gawtry, one of complainant's vice-presidents and the head of its Purchasing Department at an annual salary

of $15,000, testified *to the purchase of all materials except oil.*

For some reason not explained by complainant the purchase of oil was left to Mr. Addicks, another vice-president, who receives an annual salary of $22,500.

The testimony definitely and clearly shows that the oil was purchased at prices higher than it could have been obtained elsewhere; that there was no honest effort made by complainant to deal with any other company than the Standard Oil Company; that on the contrary its deliberate, fixed intention was to deal with the Standard Oil Company alone; and that the reason for its preference for the Standard Oil Company was the identity of interests which existed between the two companies. This identity of interest is readily inferable from the fact that both companies, to some extent at least, have a common directorate. See *Sage* v. *Culver*, 147 N. Y., 247.

The defendants endeavored to show the intimate relations between the two companies, but every attempt to do so was defeated by the Master's erroneous rulings, although the Master at one stage declared that the contract relations between these companies was a matter which the defendants were justified in analyzing. At p. 3808 the Master stated:

> "The minute we find that the Consolidated Gas Company buys all its requirements from the Standard Oil Company and that there are directors of both companies, you are justified in analyzing and closely looking into the contract relations between these companies."

Yet his real attitude was shown in the declaration which he made at p. 10350:

> The Master: I have tried to explain to you, Mr. O'Brien, that if you wanted to prove that a majority of the stock of the Standard Oil Com-

> pany was held by a majority of the stockholders of the Consolidated Gas Company, I would still say, 'Show me what difference that makes in the price of oil, how you could have gotten it any cheaper because they were in control of the Standard Oil Company and in control of the Consolidated Gas Company.' I shall rule that they were under no duty to sell their oil to the Consolidated Gas Company for less than they could get from somebody else, that they did not have to make a present to the Consolidated Gas Company of anything. That is my ruling."

By putting in evidence the contracts made by other gas companies with independent oil companies, the defendants did show that the complainant could have obtained gas oil cheaper.

Lewis B. Gawtry, one of the Vice-Presidents of the company, testified:

> "The executive committee of the Consolidated Gas Company are *William Rockefeller*, F. A. Vanderlip, George F. Cortelyou, Nicholas F. Brady and J. A. Garver" (p. 3463).

Mr. Gawtry was then asked:

> "Q. Mr. Rockefeller owns extensive interest in the Standard Oil Company of New Jersey, doesn't he?"

Objection was made to this question by complainant's counsel, whereupon the Master sustained the objection, but asked:

> "You want to show the close relations between this company and the Standard Oil Company?"

Mr. O'Brien replied: "I do."

The Master then volunteered the information that the witness "had already started to say that he does not

know what Mr. Rockefeller's interests in the Standard Oil Company are," and upon the witness stating that he had not "the slightest idea" what those interests are, the Master ruled: "That ends it. I will not let you ask any more questions about it" (pp. 3463-3464).

Immediately after making this ruling, the Master stated to defendants' counsel:

> "I am going to let you cross examine Mr. Addicks, when he comes, as to the basis of the gas oil prices fixed, but not this witness" (p. 3464).

When Mr. Addicks was on the stand, however, the following occurred:

> "The Master: Mr. Chambers, I am going to give you the widest possible latitude in attacking the good faith of these contracts and prices paid. * * * I shall expect you at the same time to co-operate with the Master in only asking questions that have some relevancy and materiality to the point to be developed. In other words, I can see how you might want to show that there were common directors to both companies and what efforts were made to get prices from other companies * * * but do not let us waste any time (p. 3891).

* * * * * * *

Mr. O'Brien.

Q. Did you ever bring up before the executive committee or did any other member cause a discussion or bring any information as to the rebate or the modified price of the Brooklyn Union Gas Company during the years 1915, 1916, 1917, 1918 or 1919? A. No, sir.

Q. Did Mr. Rockefeller refer to the Brooklyn Union in any way? A. I never recall any such reference. * * *

Q. And it has been a matter of general knowledge in the city, has it not, that he (William Rocke-

feller) is a very large shareholder in the Standard Oil Company of New York? A. Yes, that is true—of New York. I don't know about New York but as he was a large stockholder in the original New Jersey company he must be interested in the New York company by necessity" (pp. 4064-4065).

After considerable colloquy between the Master and Mr. O'Brien:

> "The Master: But my ruling is, Mr. O'Brien, that I will not take proof of common ownership of stock.
>
> Mr. O'Brien: Irrespective of how substantial they are?
>
> The Master: Yes.
>
> Mr. O'Brien: Common ownership of stock in the Standard Oil Company of New Jersey and the Consolidated Gas Company?
>
> The Master: Yes, I am not going to take that" (pp. 10348, 10349).

The tabulation given herewith shows that for the past ten years the complainant has been buying oil from the Standard Oil Company at prices much higher than those at which other gas companies have been able to purchase it.

1910-1913 Ex. AA-58	Public Service Corporation of New Jersey 125,000,000 gallons @ 2.45c.	Consolidated Gas Co. Approximately 75,000,000 gallons annually @ 3c. and 3.75c.
1914 Ex. AA-60	Public Service Corporation of New Jersey Not less than 27,000,000 nor more than 33,000,000 gallons @ 4.5c. to 5c.	Consolidated Gas Co. 105,000,000 gallons @ 5.035c.
1914 to July 31, 1919 Ex. AA-61	Public Service Corporation of New Jersey 252,000,000 gallons @ 3.05c.	Consolidated Gas Company Approximately 110,000,000 gallons annually @ 3.035c. to 7.5721c.
August 1919 to July 1920 Ex. AA-63	Public Service Corporation of New Jersey 40,000,000 gallons with privilege of 10% more or less @ 5c. to 5.60c.	Consolidated Gas Company Approximately 122,000,000 gallons @ 7.0927c.
1913 to 1914 Ex. AA-64	Equitable Gas Light Co. of Philadelphia 20,000 gallons @ 3.95c.	Consolidated Gas Co. Approximately 105,000,000 gallons @ 3.035c. to 5.035c.
Oct. 1914 to Sept. 1919 Ex. AA-68	Equitable Gas Light Co. of Philadelphia Not to exceed 5,000,000 gallons per month @ 3c.	Consolidated Gas Co. Approximately 112,000,000 gallons annually @ 3.035c. to 7.5821c.
Oct. 1, 1919, to Sept. 30, 1920 Ex. AA-66	Equitable Gas Light Co. of Philadelphia Not to exceed 3,000,000 gallons @ 5c.	Consolidated Gas Co. Approximately 122,000,000 gallons @ 6.6c. to 7.09c.
Dec. 1, 1919, to Nov. 30, 1920 Ex. AA-70	Equitable Gas Light Co. of Philadelphia Not to exceed 3,000,000 gallons @ 5c.	Consolidated Gas Co. Approximately 122,000,000 gallons @ 6.6c. to 7.09c.
5 years from April, 1917 Ex. AA-252	Boston Consolidated Gas Co. 14,000,000 gallons annually @ 3.625c. to 3.875c.	Consolidated Gas Company Approximately 112,000,000 gallons annually @ 5c. to 7.5821c.

Referring to the contract between the Gulf Refining Company and the Boston Consolidated Gas Company, the Massachusetts Department of Public Utilities said *in Re. Boston Consolidated Gas Company*, P. U. R., 1921, B., 61:

> "* * * The present contract for gas oil which expires in May, 1922, is one of the most favorable of its kind in existence, and is the most important single factor affecting the price of gas in Boston."

The contracts of the Public Service Corporation, Equitable Gas Light Company of Philadelphia and Boston Consolidated Gas Company were made with the Gulf Refining Company.

It is claimed that one of the companies mentioned in the foregoing tabulation does not furnish 22 candle-power gas. This, however, is no indictment of the oil but merely indicates that to comply with the existing law, a little more oil is needed per thousand feet. Boston was paying only 3.625, while complainant was paying 6.55 to 7.5821 and New Jersey was paying 3.05; while during the same period, Philadelphia was paying 3c. per gallon up to September, 1919, as compared with the Consolidated figure. The complainant is much nearer the oil fields than the Boston and Philadelphia companies and has the additional advantage of close affiliation with the Standard Oil Company. These facts immediately excite suspicion of the oil contracts. Mr. Addicks gave as his reason for purchasing from the Standard, that it insures a supply of oil to all the companies of uniform quality (p. 3781). He admitted it would have been feasible to have made separate contracts for every company and that it required a very large company to handle the quantities needed by all the companies together (p. 4171). The fact that companies in New Jersey and in Massachusetts, etc., are getting oil at lower prices than

the complainant indicates that cheap oil can be obtained if the companies go after it. Another argument used by the complainant is that the quantities of oil used by it are so great that it could not be secured from any company except the Standard Oil. This is answered by the fact that the quantity used by the Philadelphia company alone is about 72,000,000 gallons annually (Exhibits AA-66 and 70) which it secures from a company independent of the Standard Oil Company. The Public Service Corporation of New Jersey also buys about 40,000,000 gallons annually of oil from independent companies. Three companies buying oil from independent producers, New Jersey, Philadelphia and Boston, purchased 126,000,000 gallons. Therefore, as one company alone finds no difficulty either in buying from independent companies two-thirds as much oil as is bought by the complainant or in furnishing 22 candlepower gas, and as all the oil used for gas either made or bought by the complainant is less than that bought by the three companies in Philadelphia, New Jersey and Boston, it will be seen how unconvincing is the testimony of Mr. Addicks (p. 4181) that he wrote to the other companies to confirm the fact that the only one that could supply their wants is the Standard Oil, or at p. 4186, that it was generally expected by the oil people with whom he had talked that there was no hope of doing business with the Consolidated Gas Company.

Attention is called to the fact that the two largest items needed in the manufacture of gas are coal and oil. Mr. Gawtry, who purchases all the supplies of his company except oil, testified:

> "Q. Is there any particular reason for your distributing your business between these different companies?

Mr. Ransom: I object to the question as not material and certainly not within the scope of this witness's cross examination.

The Master: I will let him answer that one question.

A. You referred to coal?

Q. Coal, yes. A. *That would be the last thing I would do, give all our business to one company.* It means it would come from one set of mines delivered over one railroad; it would be in their hands entirely in case of strikes, shutdowns. We distribute our business the best we can.

The Master: Or accidents?

The Witness: Or accidents. *It would eliminate competition if we did that.* We try to get as much competition as possible. In the anthracite there is no competition; in the bituminous there is a good deal" (p. 3729).

The criticism made by the complainant's own purchasing officer, of giving all its purchases to one company, thus eliminating competition, is one of the strongest that could be made of the policy pursued by complainant in the buying of its oil. When the complainant bargained for its oil, it made no effort whatever to get competitive bids.

It is a well-known principle of trade that contracts for commodities made in bulk or in large quantities are made at lower prices per unit of measurement used than when the quantities bought are small. This rule seems to have been reversed in the purchase of oil by complainant, which in demanding such large quantities under one contract, excluded independent oil companies which were able to supply lesser quantities. The prices paid in Boston, Philadelphia and New Jersey show that good business management, having in mind solely the protection of complainant, could have obtained oil at prices cheaper than it paid the Standard Oil Company.

The methods pursued by the complainant in the purchase of oil demonstrate to a moral certainty that it had no intention of buying oil from any other company than the Standard.

There is ample justification for the statement just made in the testimony of Walter R. Addicks.

In the instant case the power of the Standard Oil Company of New Jersey was used to furnish the basis for complainant's claim that the statute fixing the price of gas is confiscatory.

Mr. William Rockefeller, who is a large stockholder and director of the Standard Oil Company of New Jersey, is a member of the Executive Committee of the complainant (p. 3463) and was present at the meetings of said Committee at which were approved the complainant's oil contracts, as shown by the extracts from the minutes (Ex. AA-48). The saving which could have been effected by the complainant in wise and prudent purchases of oil amounts to enough money to require the dismissal of the complaint. A difference of one cent in the price of a gallon of oil means approximately four cents per thousand cubic feet of gas, so that, if the complainant during a given period paid two cents per gallon more than it ought to have paid and than other companies in the same general territory paid, the complainant's production costs were eight cents more per thousand cubic feet than they should have been.

Complainant offered no evidence to show that it could not have bought the quantities at the prices paid by other gas companies. If we take the quantities bought by other gas companies and compare the maximum prices they paid with the minimum prices paid by complainant, it will be seen that complainant could have effected a saving running into millions of dollars had it dealt with the oil companies that other gas companies did

(see *ante*, tabulation of comparative prices paid by complainant and other gas companies).

Judge HAND apparently failed to perceive the conclusion to be drawn from these facts. Even if we agree with him—which we do not—that there is nothing sinister in the connection between complainant and the Standard Oil Company of New Jersey, nevertheless it is true that complainant did not accomplish the saving in its oil purchases which it could easily have done. If there is nothing sinister in complainant's failure to save such substantial sums in its oil purchases, at least its consumers should not be made to suffer for its exclusive dealings with the Standard Oil Company of New Jersey.

Even without this situation of a community of interest between complainant and the Standard Oil Company, the burden of proof is on complainant to establish reasonable, prudent and economical purchases of oil.

We have a still more startling situation which further increases the complainant's obligation as to proof and justification of its oil contracts. Not only were these contracts not made after real, earnest, competitive bidding; not only had they been given over to one company from year to year at that company's price; not only have these purchases been made of a company controlled by a dominant factor of the complainant company, but the price paid during the period selected for the determination of the cost of making gas is at least two cents per gallon more than the largest companies in this part of the country are paying, namely, the U. G. I., of Philadelphia, which was paying as of September 19, 1919, three cents per gallon; the Public Service Corporation of New Jersey, which was paying from 5 to 5.60 cents per gallon as of September 19, 1919; and the Boston Consolidated Gas Company of Boston, which was paying 3.625 to 3.875 cents per gallon as of September 19, 1919.

Other accentuating facts present a situation which is perhaps the most important in this case, namely, that complainant's oil contracts were made at prices which, under all the circumstances, cannot be defended as reasonable, prudent and economical.

(a) Other officers of the complainant besides Mr. Rockefeller are stockholders in the Standard Oil Company of New Jersey.

(b) The Standard Oil Company of New Jersey has its oil refineries in Bayonne, New Jersey, and with a short haul across the North River ought to be able to deliver to the complainant gas oil even more cheaply than at the prices bid by the several large companies above enumerated.

(c) For the past three years the complainant purchased tremendously large quantities of gas oil from the Standard Oil Company, to wit, from 112 to 122 million gallons annually.

(d) The complainant purchased gas oil for itself and for all of its subsidiaries. Thus, the quantities of oil purchased by it and its subsidiaries are so great as to suggest even to a layman the desirability, upon grounds of economy as well as of protection against the demands of the Standard Oil Company, of having its own gas oil storage in or around New York and of purchasing its own gas oil direct from the producers without the intervention or the medium of the Standard Oil Company.

Why has it not done this and saved to the company millions of dollars?

The answer made to this query by Mr. Addicks in his testimony is entirely unsatisfactory.

It is a matter of common knowledge that other utility companies generally conceded to be in a prosperous con-

dition have found it profitable to own their own oil supplies.

Why has the complainant not developed or extended its coal gas making units, especially in the face of the rising price of gas oil?

Why did it not carry out the original purpose as to extensive coal gas units at Astoria which would enable it to cut loose from the Standard Oil and put itself in a position to obtain cheap oil?

Why does it seem to be continually fostering the making of water gas, which, according to its own claim, means the use of over 4 gallons of oil as compared to about 1½ gallons used in enriching coal gas?

Why, even in the face of what it claimed to be a startlingly rising price of gas oil, did it add a water gas unit to the plant at Astoria (all of the alleged cost of which Judge HAND included in the rate base in this case) and not a coal gas unit?

Since 1904 Mr. Addicks has negotiated the complainant's gas oil contracts. He testified that, as a rule, the contracts were made over a period of time ordinarily not less than twelve months and for specific quantities of oil delivered within that period at a stipulated price (p. 3778). Mr. Addicks also testified that the reason why the Company regards it as advantageous to purchase oil upon the basis of including the requirements of its affiliated companies, is that it insures the requisite supply of oil for said companies (125,000,000 gallons a year; (p. 4171); and also oil of a uniform quality (p. 3781).

The complainant has never purchased a gallon of oil for itself or its subsidiary companies except from the Standard Oil Company of New Jersey (p. 3993).

If Mr. Addicks' testimony is to be taken as true, the situation which has always confronted the complainant is that there is no one except the Standard Oil Company

able to meet its requirements as to quantity and quality. It may easily be inferred from all of the circumstances surrounding the making of the complainant's oil contracts that when Mr. Addicks gave that testimony he was indulging in pure assumption. It is apparent there were other companies able to meet complainant's requirements, but there was no desire on the part of the complainant to deal with any of those companies.

On July 27, 1916, according to Mr. Addicks, the Consolidated Gas Company was faced with a material advance in the price of oil and on that date Mr. Addicks discussed with Mr. T. J. Williams, of the Standard Oil Company of New Jersey, the matter of a contract to be enforced after the expiration of the then existing contract of December 31, 1916 (pp. 3789, 3790). On the next day, July 28, Mr. Addicks wrote three letters, one to the Texas Company, one to the Sun Company, and one to the Tidewater Oil Company, (p. 3793). The evident insincerity of these letters becomes apparent the moment they are read. They are couched in such a way as to invite a quick refusal of compliance with their terms.

On cross-examination Mr. Addicks testified:

> "Q. Now, this is Exhibit 292, the form of the letter. This appears to be the one to the Sun Company. In these letters that you were writing, like Exhibit 292, you are asking for making a contract during the year? * * * A. Yes; it is simply the price per gallon for 1917 delivery.
>
> Q. *That letter does not indicate that you want any specific quantity, does it?* A. No, because——
>
> Q. It does not really say you want any; it is merely an inquiry? A. Yes, because if I gave a specific quantity it would drive them out; I could not get an answer" (p. 3992).

In other words, when Mr. Addicks wrote the letter (Ex. No. 292) to the Sun Company, he knew that if he

stated the volume of complainant's requirements, he would be suggesting a contract which the Sun Company could not fulfill. Why, then, did he write the letter? The question suggests an interesting, albeit painful inquiry. When Mr. Addicks wrote to the Sun Company, was he then preparing an alibi against the charge that the complainant had no desire to buy its oil from any other company than the Standard? And if, as complainant claims, the Standard is the only company able to meet its requirements, why was it necessary to attempt negotiations with any other concern?

The contract made with the Standard Oil Company for the oil requirements of the Consolidated and its affiliated companies for the year 1917 called for 112,000,000 gallons. There was no evidence by Mr. Addicks or by any other witness called by complainant that the Sun Company, the Texas Company, the Tidewater Oil Company or any other oil company could not alone or at least the three mentioned combined, could not have furnished an amount of oil to complainant for one year's supply. And apropos of Mr. Addicks' feeling that none of the companies to which he addressed his letters was able to furnish oil to the complainant in the desired quantities, it does not appear that Mr. Addicks had any knowledge of the ability of any other oil company than the Standard Oil Company. He admitted that he was not aware of the fact that in 1914 the Gulf Refining Company had entered into a contract with the Public Service Gas Corporation of New Jersey to supply it with 252,000,000 gallons of oil for the five years ensuing August, 1914 (p. 4091).

The oil was purchased at prices higher than it could have been obtained elsewhere.

Eugene F. Rosenquest, President of the Bronx Gas and Electric Light Company, testified that on the 23rd day of July, 1908, he purchased for his company from the Standard Oil Company of New York two million gallons of oil to be delivered as required at 3.1 cents a gallon (p. 10009).

In 1908, the price paid for oil by the Consolidated Gas Company to the Standard Oil Company was 4.29 cents a gallon.

On November 8, 1911, Mr. Rosenquest, on behalf of his company, made a contract with the Standard Oil Company for two million gallons of oil, with an option for another million gallons at 3 cents a gallon (p. 10010).

In 1911, 1912 and 1913, the price paid by the Consolidated Gas Company for oil bought by it from the Stand-Oil Company was three cents and 3.75 cents a gallon.

On September 10, 1914, Mr. Rosenquest, on behalf of his company, made another contract with the Standard Oil Company for two million gallons of oil at 3½ cents a gallon (p. 10013).

In 1914, the price paid by the Consolidated Gas Company for oil bought by it from the Standard Oil Company was 5.035 cents a gallon.

Little, if any, weight should be given to Mr. Addicks' testimony, that the oil purchased by the Consolidated Gas Company was bought at the best price that could be obtained under these existing conditions.

On cross examination, Mr. Addicks testified:

> "Q. Did you consider the price set forth in Exhibit 337 was a reasonable one—this modified contract * * * that you made on July 1, 1914? A. I think so, yes.

Q. Very low, was it not? A. I think it was the lowest figure that I had been quoted.

Q. And you did not expect to get oil much lower than that did you at that time or any other time? A. I did not expect to get oil lower than that at any other time.

Q. Yes. A. It was a good low price.

Q. Was it not in your judgment about the bottom for gas oil? A. Well, I don't remember ever getting oil cheaper than that.

Q. And wasn't that your opinion at that time? A. It must have been (p. 3961).

* * * * * * *

Q. You are acquainted somewhat with the Boston Consolidated Gas Company? A. In former years I was.

Q. Did you know at this very same time (at the time the complainant's 1914 contract was made) they made a long term contract? A. No (p. 3963).

Q. Did you learn that the Public Service Company of New Jersey had at this very same time that you had the modification of contracts, or about that time, entered into a long term contract for the purchase of oil? A. I don't see how I could, no.

Q. The question is did you know? A. No (p. 3964).

Q. Did you acquaint yourself in making these contracts with the prices being made by the various companies of the country? A. No; I depended

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The Master: You have covered that two or three times, Mr. O'Brien.

Mr. O'Brien: I am leading up to this question.

Q. Have you gone into the prices paid by the gas companies in the larger cities of the country? A. No, not particularly (p. 4101).

Q. Getting back to that Chicago price again, I want to get a definite statement from you as to whether you went into the prices there? A. In making this last contract?

Q. Yes. A. No, I did not" (p. 4106).

With the exception of Mr. O'Malley, of the Sun Company, and Mr. Williams, of the Standard Oil Company, Mr. Addicks testified on cross-examination that he had spoken to no other official or representative of any oil company relative to contracts to supply oil to the complainant (p. 4185) and that in one of his conversations with Mr. O'Malley the latter stated that:

> *"It was generally expected by the oil people I had talked with that there was no hope of doing business with the Consolidated Gas Company"* (p. 4186).

"Q. What did you learn about what the other companies were paying before you made this contract, Exhibit 318? A. I can't find any record as to what inquiry I had at that time (p. 3922).

Q. What I want to know is, you were about to make a contract (November 1, 1905) for an enormous and overwhelming quantity of oil, 255,000,000 gallons. Now, did you make any effort to ascertain what other companies were paying in this city for gas oil? A. I don't recall at this time.

Q. Do you mean to tell the Court you did not make any inquiry as to what they were paying at all? A. I will not say that. I do not think I made inquiries in regard to other companies at that time (p. 3924).

Q. This contract was not the result of any public bidding of any kind, was it? A. No.

Q. You did not call for bids? A. No. (p. 3925).

Q. With whom did you negotiate for this contract, Exhibit 335, for 1913, covering oil for 1914? A. I probably saw in connection with that contract Mr. T. J. Williams and probably Mr. Teagle.

Q. Was it the result of public bidding? A. No.

Q. Did you inquire from any other companies whether they would furnish you the oil or the amount of oil mentioned in this contract, Exhibit 335? A. Inquiry was made from other companies

during the period of 1914 but not for this particular contract (p. 3957).

Q. The next contract would be 1917; have you got that?

(Witness produces paper.)

Q. Exhibit 290 appears to be the next contract that you made with the Standard Oil Company; was that at public bidding or private negotiation? A. I asked for bids that year.

Q. Those letters you have already told us about, I take it? A. Yes" (p. 3964).

The evidence abundantly justifies the conclusion that substantial economy in manufacture could have been effected by the complainant had it used crude oil instead of the gas oil which it bought from the Standard Oil Company.

There is no statutory requirement concerning the substance from which gas can be made. Crude oil is cheaper than gas oil and the sources from which it is obtained are more numerous than those from which gas oil is secured. It is extensively used in gas manufacture and its utility for gas making purposes depends simply upon the ability of the individual who operates the machine. No real effort, however, was made by this company to test the feasibility of crude oil in gas making. Mr. Addicks testified:

"Q. What has the company done in the shape of making a serious investigation into that subject, the subject of using crude oil to make gas? A. I asked for a sample barrel of a heavy material from Mr. Williams, having in view what I have said, and he sent me a sample of Mexican crude oil. I had it analyzed by our chemist (Dr. Love) and he advised me that he didn't think it was fit for manufacture of illuminating gas. I did not ask for

Mexican crude; I asked for a heavy material that I could buy cheaper than our present oil.

Q. If you went into a serious investigation of that subject, why didn't you get the crude from different fields? A. I did not ask for crude; I asked for a heavier oil that I could buy cheaper than the present oil (p. 4269).

Q. Was it simply the analysis of the oil that he (Dr. Love, the complainant's chemist) sent to you? A. Yes, an analysis and a memorandum of transmittal.

Q. Was this question submitted to any gas engineer of the company? A. *No, I don't think it was.* He may have discussed the matter with the engineer.

Q. So far as you know, however, it was not submitted? A. No, I was at the preliminary investigation myself (p. 4277).

Q. Did you get any samples of crude oil from any other source? A. Yes, sir.

Q. Why didn't you?

> The Master: The witness has already stated he didn't have time. He stated he only started with the early part of this year and has not had time to go ahead with it. *There is no use of asking that again.*

Q. I will ask you why haven't you had time for this matter; did you assume that it was of lesser importance? A. No, I have been turning the matter over in my mind with respect to it and matters in connection with this case have been sufficient to crowd out some other things that I would have liked to do" (p. 4278).

Mr. Addicks admitted that "in years gone by" he has used crude oil (p. 4270); that certain other companies are using crude oil, but not in the quantites used by the complainant, that crude oil is produced in large quantities in Pennsylvania, Lima, Indiana, Oklahoma, Louisiana, California, Mexico and in South America (p. 4271); but that he had been informed "probably six or eight or nine years ago" by Mr. Higgins, of the Standard Oil Company *that the Standard Oil Company would not sell any crude oil* (pp. 4273, 4274).

Mr. Addicks also stated that in the use of crude oil "there would be a residue in the oil that would stop up your machines and stop up your works, possibly" (p. 4272). Mr. Higgins, however, testified that the results obtained in a gas machine depend largely on the ability of the operator (p. 10251).

VIII.

The franchises should not be included in the property upon which complainant is entitled to a return.

In the instant case, the Master felt that he was bound by this Court's acceptance of the value of complainant's franchises in the prior suit (*Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 47). The Master said:

> "As I read the opinion of the court in that case, the court refused to disturb the value of $7,781,000 agreed upon as representing the franchises. I quote from page 47:
>
> 'We think that under the above facts, the courts ought to accept the valuation of the franchises fixed and agreed upon under the Act of 1884 as conclusive at that time. The valuation was provided for in the Act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years (now thirty-four years) past on the basis of the validity of the stock issued by the company.'
>
> Unless, therefore, there is force in the contention made by counsel for the Public Service Commission that one of the principal franchises included in this valuation has expired and that therefore that value no longer exists, I feel bound to accept that value of $7,781,000 for franchises" (Master's Opinion, Rec., p. 62a).

Speaking of the franchises, Judge HAND, among other things, said (italics ours):

> "I own that I am not clear whether or not the Supreme Court meant to declare that this value should exist perpetually as a means of

> drawing a profit of six per cent. or more; but it is clear enough that if it was worth that sum in 1884 and 1909, *on any conceivable theory it is worth as much in 1920.* Therefore, it appears to me that the Master did all that he could under the circumstances in adding that sum to the 'rate base' until at least the Supreme Court shall indicate some contrary theory" (Rec., pp. 147a, 148a).

It is respectfully submitted that Judge HAND misapprehended the language of this tribunal in the prior suit. What the Court then said was (italics ours):

> "Real estate may have increased very largely as also the personal property, *without any necessary increase in the value of the franchises. Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company without legislative interference with the price for the supply of gas, but that immunity for the future was, of course, uncertain, and the moment it ceased and the legislature reduced the earnings to a reasonable sum, the great value of the franchises would be at once and unfavorably affected but how much so it is not possible for us now to say. The value would most certainly not increase*" (p. 47).

So far as the evidence shows, the franchises upon which a return has been allowed were acquired by complainant without the expenditure of a single penny.

In the prior suit, Mr. Justice PECKHAM, writing for this Court, said:

> "Not one of the companies had ever been called upon to pay a penny for such right but the grant to each was in that aspect a gratuity. It was not at the time of the granting of franchises such as these, the custom to pay for them."
>
> *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 43.

And in the instant case, the Master, speaking upon the same subject, said:

> "There is no evidence that the constituent companies paid anything for the franchise rights" (Master's Opinion, Rec., p. 46a).

Complainant's own evidence is that the value of its franchises is merely nominal. Mr. Carter testified:

> "Q. * * * In speaking of a complaint you made in 1905, which was verified the 26th day of March, 1906, he (the then counsel for the City of New York) asked you as follows:
>
> Q. You stated in this complaint further: 'There is no method or evidence by which the value of the tangible rights to lay and maintain mains and pipes in the streets can be determined. There exists no market or demand for such right, permission or franchise. The price at which the complainant's franchises would sell under ordinary circumstances *is merely nominal.* The municipal authorities of the City of New York have never fixed any amount as the consideration for granting such franchises, and the right to lay mains and pipes in the streets has always been procurable from said municipal authorities without the payment of any monetary consideration therefor. The number of said franchises which may exist at any time has never been limited by said municipal authorities. The value of said right to occupy the streets does not exceed the cost of procuring such a right from the City, and that cost is nominal.' Is that a correct extract from this sworn complaint and did you so state? A. Yes, sir.
>
> Q. Is that correct? A. I assume it is a correct record, in which event that is what was stated.
>
> Q. That question was put to you and you made that answer? A. Yes, sir" (Rec., pp. 8438-9).

It was complainant's duty to show, if it could, that no depreciation in the value of its franchises had fol-

lowed the Legislature's action in regulating the prices charged by complainant for its gas. In the absence of such evidence there is nothing to justify the finding that the value of complainant's franchises is the same now as it was in 1884, which value this Court felt "it ought to accept as conclusive *at that time*" (p. 47) because of the Legislature's non-interference with complainant's "opportunity of obtaining these enormous and excessive returns" (*Id.*).

This Court's opinion in the prior suit was handed down on January 12, 1909. Since that date there have been a number of decisions by Federal and State courts squarely holding that franchises for which no money was paid will not be included as part of the property upon which a return is to be allowed.

In the case of *Cumberland Tel. & Tel. Co.* v. *City of Louisville* (decided April, 1911), 187 Fed., 637, 647, the franchise was "given freely and without price to one of the constituent companies of which complainant was made up." Franchise value was not allowed; although, as in the *Consolidated* case, *ante*, that value had been included in a consolidation and carried on the books as an asset. The Court said:

> "As it was a free bestowment by the people and could not figure as an item of expense in the original cost of the plant and as no direct proof was tendered as to its present value (the only proof being that it was put into the consolidated company at say, $100,000, and then afterward carried by the company on its books as an asset), we are disposed to ignore it as one of the values upon which a fair return may be earned by the rates charged to the people who gave it. If it had been paid for originally, or even if any testimony had specifically shown its present value, we might have reached a different conclusion, but under the circumstances we are not disposed to guess about it."

In *Lincoln Gas & Electric Light Co.* v. *City of Lincoln*, decided April, 1909, 182 Fed., 928, the Nebraska Circuit Court said:

> "I do not allow anything as the value of complainant's franchise; it does not appear from the allegations of the bill or proofs that anything was paid to the city for the franchise; the city simply granted to complainant, without compensation, the right to use the public streets and the alleys for the purpose of constructing and operating its plant. This was a mere right and privilege to complainant and did not involve the expenditure of money; while it is true a franchise is a property right, which will protect complainant in its use of the streets and alleys for the purposes expressed, yet it involves no investment of money, complainant's investment being in its tangible property under authority of the franchise, and the public ought not to be taxed for a privilege which it has voluntarily granted. I do not think that there is anything in the case of *Willcox* v. *Consolidated Gas Company*, 212 U. S., 19, which conflicts with this view."

When the *Lincoln Gas* case, *supra*, came before this Court (250 U. S., 256; argued October 5, 8, 1917. Decided June 2, 1919), nothing whatever was said by this tribunal about the gas company's franchise values.

In *Public Service Gas Co.* v. *Utility Commission*, decided July, 1913, 87 Atl. Rep., 651 (Supreme Court of New Jersey), which involved circumstances similar to those in the instant case, *i. e.*, stock issued for franchise value upon consolidation of other companies, the Court said:

> "The stockholder must be assumed to have taken his stock with knowledge of the law that the rate was subject to public regulation. The right would be of no avail if the public service corporation could capitalize its special franchises

and insist on the right to a rate which would enable it to pay dividends on that capitalization."

In *Duluth St. Railway Co.* v. *R. R. Commissioners*, decided June, 1915, 152 N. W. Rep., 887, 896 (Supreme Court of Wisconsin), the Court said:

> "Where, as here, the right exists at any time to regulate the charge, all the allowance is made for a franchise that should be made when a fair value is fixed upon the property based on the assumption that the business is a going one. * * *
>
> Where, as here, only a reasonable rate may be charged under a franchise, it is difficult to see where it has very much value aside from the privilege to operate and that as it appears to us, has been taken care of" (citing *Willcox* v. *Consolidated Gas Co., ante*).

In *Spring Valley Waterworks* v. *City of San Francisco*, decided October, 1911, 192 Fed. Rep., 137, and in *Home Tel. Co.* v. *City of Carthage*, decided March, 1911, 139 S. W. Rep., 547 (Supreme Court of Missouri), franchise values were not allowed.

In *Bronx Gas & Electric Co.* v. *Public Service Commission*, decided December, 1919, 190 App. Div., 13, 25, Mr. Justice Page, speaking for the Court, said:

> "We observe, also, that the plaintiff seeks to have its franchises included in its property upon the value of which an adequate return is to be estimated. It has been repeatedly held, and is now settled, that the franchise which is obtained from the State is not property devoted to the public use, upon the value of which it is entitled to a return from the rate charged for its service."

From the language of Section 69 of the Public Service Commissions Law (Chap. 134, Laws of 1921, a re-enactment of previous statutes), it is readily inferable that it is the policy of the State of New York to refuse to include franchises in the property upon which a public utility corporation is entitled to a return, when nothing has actually been paid for such franchises. The Section reads:

> "* * * Provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own or operate or enjoy any franchise whatsoever in excess of the amount * * * actually paid to the state or to any political sub-division thereof as the consideration for the grant of such franchise or right * * *."

IX.

Judge Hand erred in fixing the sum of $71,977,533 as the fair value of complainant's property upon which it is entitled to a return.

The fair value of complainant's property upon which it is entitled to a return is discussed in the brief of the appellant Attorney General, and with his views on that subject we are in full accord. The purpose of the following discussion is to show that Judge HAND's conclusions are erroneous even if the theory he adopted be given any weight.

Judge HAND reached his figures by taking those which the Master accepted upon complainant's erroneous theory, and then making certain additions thereto and deductions therefrom.

The method adopted by complainant was to give the 1919 assessed values of the land unimproved; its book figures purporting to represent the cost to it of the properties of the constituent companies taken over at the time of the consolidation in 1884, but really the estimates placed upon such properties by a Mr. Rowland a short time prior to the consolidation; and an arbitrary estimate of franchise value, being the difference between said estimates and the alleged purchase price; plus its book figures purporting to show the costs of additions and withdrawals since 1884.

In the prior suit, this Court held:

> "There must be a fair return upon the reasonable value of the property at the time it is being used by the public."
>
> *Willcox* v. *Consolidated Gas Company*, 212 U. S., 19, 41.

Complainant offered no direct evidence to show the value, at the time of the trial, of its property in use by the public. It introduced some testimony apparently intended to show that present costs of labor and material are higher than those it used at the time of the trial of the prior suit in 1906. The Master was of the opinion, and Judge HAND adopted his reasoning, that while complainant offered no evidence of present reproduction cost, such cost is at least as much as the sum at which the property was appraised in 1906, and that property added since 1906 is worth at least as much as it cost when erected and installed.

Testimony of reproduction cost confined to the abnormal period 1918-1919 would be incompetent. The Master's statement reads like admiring praise of complainant's extreme moderation in not insisting upon reproduction cost as the method upon which to determine the reasonable value of its property.

The Master also stated:

> "I have found that, *starting with the value of the property as fixed and agreed upon in 1884 and the issuance of stock at par upon that basis* * * * *there is actually invested in property* used in the gas business of the complainant no less than $71,-054,351.14, exclusive of * * * working capital" (Rec., p. 66a).

The Master's statement is misleading. Certain estimates were put upon the properties of the constituent companies, and upon the basis of those estimates there was an issuance of stock. But it cannot be held that stock issued is a measure either of actual value, actual cost or actual investment.

Again the Master stated:

> " * * * But no action was ever instituted by the State challenging the incorporation of the com-

> plainant company; no effort was ever made by the State in any proper proceeding to prove that the property transferred to the complainant company on consolidation was not worth the price agreed upon, and the public, through thirty-six years, has been led to believe, by inactivity on the part of the State, that the stock issued by the complainant company on organization was in compliance with Chapter 367 of the Laws of 1884, and was for property 'the fair aggregate value' of which was the amount paid in par value stock therefor" (Rec., p. 46a).

Judge HAND held that "the inaction of the authorities gives no prescription" to what appears to have been an overcapitalization of the properties of the constituent companies taken over at the time of the consolidation in 1884.

As was said by Mr. Justice PECKHAM in the prior suit:

> "The evidence shows that from their creation, down to the consolidation in 1884, these companies had been free from legislative regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders, dividends which are characterized by the Senate committee, appointed in 1885 to investigate the facts surrounding the consolidation, as enormous. The report of that committee shows that several of the companies had averaged, from their creation, dividends over sixteen per cent. and the six companies in the year 1884 paid a dividend upon capital which had been increased by earnings, as in the case of the Manhattan and New York, of eighteen per cent., and had it been upon the money actually paid in, it would have been nearly twenty-five per cent."
>
> *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 45.

The Master also stated:

> "I am inclined to believe that the actual cost to the constituent companies was less than their appraised value in 1884 * * *" (Opinion, Rec., p. 46a).

There is abundant confirmation of the Master's rather mild statement in the report to which this court referred in the prior suit.

The committee of the New York State Senate appointed to "investigate the facts surrounding the consolidation," found, among other things (Sen. Doc. 47; Complainant's Ex. 398; Rec., p. 8347; Defendants' Ex. AA-46; Rec., p. 9180):

> The actual capital contributed by the stockholders of the six constituent companies amounted to the sum of $8,727,000 (p. xxviii).
>
> There had been paid to capital from surplus profits, $4,284,700 (p. xxix).
>
> There was issued for property, shares representing par value the sum of $2,488,250.
>
> The sums above mentioned, aggregating $15,500,000 comprehended the actual capital of all constituent companies at the time of the consolidation. The total cost from all sources of property paid for by stockholders' original contributions, by surplus earnings, by stock treated as money, and from the proceeds of bonds and other loans * * * $20,942,632.85.
>
> Total outstanding indebtedness of the six constituent companies, $2,329,000, which said sum should be deducted from $20,942,632.85.
>
> That from the books of the constituent companies their actual investment was not greater than $18,613,632.
>
> And that this sum should be further diminished by the proper amount to represent actual loss of mains, apparatus, wear and tear, and destroyed or impaired property (p. xxx).

An examination of the Master's and Judge HAND'S findings will show that the bases upon which they relied are so utterly inadequate to prove either the present value of complainant's property or the amount of cash actually invested in it, that the judgment rendered in complainant's favor must be reversed.

The Master found (Finding 63, Rec., p. 38a):

"Exclusive of working capital, I find the fair value of the property, * * * as of January 1, 1919, and since that date, and on which it (complainant) is entitled to have a fair return computed, to be at least the sum of $71,054,351.14, arrived at as follows:

Property other than particularly specified.	$38,675,393.99
Franchises	7,781,000.00
Astoria property	17,169,342.57
Astoria tunnel	5,178,614.58
One-half the cost of the new 30,000,000 unit	2,250,000.00
Total	$71,054,351.14"

The Master found the figure of $38,675,393.99 by taking the items which make up that sum as they appear in Complainant's Ex. 496 (Rec., p. 17444) presented by Mr. Carter.

It is impossible to reconcile the Master's findings with the facts. There can be no readjustment of his figures without recourse to guesswork.

The first item in Complainant's Exhibit 496,

Real Estate $10,647,062.94

which is the figure found by the Master, represents neither the value or cost of nor the investment in complainant's real estate. The term, "Real Estate," in Complainant's Exhibit 496, is intended to cover "Real Estate Land and Improvements, other than Plant"; (Complainant's Exhibit 497; Rec., p. 17445).

The total given of the assessed values of the land *unimproved* for the year 1919 is $9,531,275 (Master's Findings, Rec., pp. 39a, 40a). If this figure is to be taken as the value of the land, obviously the difference between it and $10,647,062.94 is not the value of the buildings. The figure of $10,647,062.94 includes over three million dollars for the general office building (Master's Opinion; Rec., p. 65a).

Mr. Carter's figure, $10,647,062.94, is the present "book cost"; that is to say, it covers additions to the opening entries made in complainant's books, which entries are alleged to be based upon an appraisal made by a Mr. Rowland, since deceased, of the properties of the constituent companies taken over at the time of the consolidation.

What Mr. Carter described as the book cost cannot be taken as evidence of value or as evidence of the amount actually paid by complainant for the properties of the constituent companies. Mr. Carter did not testify that the opening entries represent cash paid by complainant for those properties. All his testimony amounts to is, that such entries represent Rowland's estimates and that capital stock was issued by complainant for the total of such estimates, and for alleged franchise value.

Mr. Carter testified:

> "Q. What was the original amount of the capital stock of the Consolidated Gas Company in 1884?
>
> The Master: By that you mean, what was issued or authorized?
>
> Mr. Ransom: Yes, first authorized, and issued.
>
> The Master: The authorized capital appears in the charter, does it not?
>
> Mr. Ransom: Yes.
>
> The Master: Then I will not take that.

Q. What amount of stock was actually issued at that time?

The Master: At what time?

Mr. Ransom: 1884.

The Master: Do you mean the original issue of stock?

Mr. Ransom: Yes.

The Master: First issue of stock to anybody?

Mr. Ransom: Yes, at the time of the consolidation.

Mr. O'Brien: I object to it as incompetent, irrelevant and immaterial.

The Master: I will take that.

Mr. O'Brien: Exception.

A. $35,430,060 par value capital stock.

Q. Can you tell how much of that was issued as for tangible property?

Mr. O'Brien: I object to that as incompetent, irrelevant and immaterial and as calling for a conclusion.

The Master: Objection overruled.

Mr. O'Brien: Do you mean in return for or as compensation to somebody for tangible property received. I think we ought to have a definite question, your Honor.

The Master: The question is definite enough for me; I understand it.

Mr. Chambers: Same objection, and exception.

Mr. O'Brien: Exception.

A. Total amount issued for tangible property namely, $27,649,060, was $2,344,940 less than the amount at which the tangible property was appraised, namely, $29,994,000 (Rec., pp. 8334-5).

Mr. O'Brien: I move to strike out as not responsive, your Honor.

The Master: Strike out everything but the statement that the original amount of stock is-

sued for tangible property was twenty-seven-odd million.

The Witness: $27,649,060.

The Master: Otherwise the answer is stricken out.

Mr. O'Brien: Exception.

Q. For what purpose was the balance of the stock issued?

Mr. O'Brien: Same objection, your Honor.

The Master: You mean for what purpose, or for what cash, or what property, or what?

Mr. O'Brien: Your Honor, they may have handed a bunch of it to somebody for lobbying, but it does not cut any figure in this case.

The Master: I am going to find out what it was for. If that was so, it would cut some figure.

Mr. O'Brien: It is not a measure of value in the case today.

A. It was issued for property.

By the Master.

Q. All of the balance? A. Not tangible property, your Honor.

Mr. O'Brien: I object to that.

Q. What did the intangible property consist of? A. Franchises and rights, as they were so termed at the time" (Rec., p. 8336).

Q. In other words, the buildings, the plants, machinery, real estate, land and the rest of it cost you twenty-seven million in par value of stock? A. But we assumed the obligations that were then outstanding on the property.

Mr. O'Brien: Just a minute, Mr. Carter. You know the Court too well to come back and insert some answer into this record.

The Master: Who gave you permission to lecture Mr. Carter?

Mr. O'Brien: I am just interpolating his name there, but I am objecting to the Court.

The Master: Don't do it again.

Mr. O'Brien: I don't want anybody to pad this record without my objection to it.

The Master: Don't do it again. If anybody is going to lecture Mr. Carter, I will do it.

Mr. O'Brien: I would like your Honor to repeat then, what I said to him.

Mr. Chambers: I object to the question as to how much it cost the company, as incompetent, irrelevant and immaterial.

Q. Your company issued $35,000,000 of stock on organization? A. Yes, sir.

Q. For tangible and intangible property? A. Yes.

Mr. O'Brien: I make the same objection, for the reason that that all involves a legal conclusion. The witness is not qualified to state it, your Honor. Exception.

Q. For that, as I understand, you issued twenty-seven million dollars for tangible property which you purchased subject to incumbrances? A. Subject to incumbrances.

Q. The incumbrances being what? A. The incumbrances being $2,329,000" (Rec., pp. 8336-7).

Immediately after Mr. Carter gave the testimony just quoted, the Master made the following statement, which is not warranted by the evidence:

> "They paid $30,000,000 approximately for the plant, real estate, equipment, and the like, taken subject to a mortgage of two million dollars, and the balance they paid, instead of in cash, in par value of stock."

The evidence is, not that complainant *paid* "$30,000,000 approximately for the plant, real estate, equipment, and the like," but that it issued stock of the alleged

value of $35,430,060; twenty-seven millions of which represented the amount of Rowland's estimates of the properties of the constituent companies (Rec., p. 10692), and the balance of which was issued for the franchises. Mr. Carter admitted that for these franchises, complainant paid nothing.

At a subsequent hearing, the Master asked Mr. Carter:

> "Q. I am going to ask you one more question, but do not answer it until Mr. Chambers objects, because I may sustain the objection to my own question. Based upon the knowledge you had surrounding the organization of this company and immediately following it, would you say that the figures placed upon the combined properties for which the stock was issued, as you have testified, was the fair aggregate value of the property at that time?"

Mr. Chambers did object, upon the grounds that the question "is irrelevant, immaterial and incompetent; Mr. Carter is not a gas engineer, is not shown to have been familiar with values or cost then."

The Master sustained the objection, stating: "I am doubtful as to just what Mr. Carter's qualification was" (Rec., p. 10694).

Although the Master sustained the objection to his own question, he subsequently made the statement:

> "I shall refuse absolutely to consider the cost of this real estate to constituent companies, and I shall find as the basis from which I will start, the fair value of the real estate and other properties turned over to the Consolidated Gas Company as of November 11, 1884, at approximately thirty million dollars" (Rec., p. 11057).

In answer to counsel for the defendant Public Service Commission, Mr. Carter testified that the aggregate par

value of stock issued by complainant at the time of its consolidation of the constituent companies was approximately the market value of the securities of those companies (Rec., pp. 10694-5). Of this testimony, it seems scarcely necessary to observe that the market value of the securities of the constituent companies can no more be taken as proof of the value of their properties than can the figure at which such properties were capitalized by complainant.

Judge HAND accepted the Master's basis for the figure of $10,647,062.94, but made some slight deductions which relate to pieces of property that Judge HAND concluded were not used and useful. These do not include all the deductions claimed therefor by appellants.

The Master took his figure of $13,119,754.76 for manufacturing plants and holder stations from Mr. Carter's Exhibit 496. That the amount, $13,119,754.76, adopted without change by the Master, included several items which should have been eliminated, is shown by the following extracts from Mr. Carter's testimony:

> Opening entry for the 42nd Street plant, which includes a part of $25,333 for an office lease which expired May 1, 1891. Mr. Carter admitted that none of this had been credited on his Exhibit 496 (Rec., pp. 14592-3).
>
> Certain benches at the 21st Street station which have not been used in many years, which are not now in condition to be used and have not been eliminated from Exhibit 496 (Rec., pp. 14603-5).
>
> Exhauster originally included at $5,000; credited on Exhibit 496 at $4,000 (Rec., pp. 14610-11).
>
> $58,000 for benches at the 99th Street station; not credited on Exhibit 496; not used for gas manufacture but alleged to be used for storage purposes. Mr. Carter testified that he made no attempt to ascertain whether or not the benches, foundations, etc., should have been withdrawn (Rec., p. 14622).

In addition to the foregoing, Mr. Carter admitted that the sum of $12,500 for houses at East 63d Street, not now claimed by the company as gas property, was not credited on Exhibit 496 (Rec., p. 14612).

The precise amount of some of the foregoing items cannot be stated because complainant failed to show the extent to which the book credits are erroneous.

From the Master's figure of $13,119,754.75 Judge HAND made certain deductions, none of which are for the items to which reference has just been made, nor do Judge HAND's deductions include all that defendants contend should be made.

The Master's figure of $11,027,266.24 for street mains is taken without change from Mr. Carter's Exhibit 496 and was adopted by Judge HAND. Mr. Carter's figure *includes disused mains;* that is, mains still in the street and, although at one time used, not now used (Rec., pp. 14639-14641).

It is impossible to determine from the record how much should be deducted for disused mains included in Exhibit 496.

A further exaggeration of complainant's capital account figures appears from Mr. Carter's testimony that the company charged upon its books the cost of laying mains, whether laid for itself or for other companies and did not credit the account with the cost of such mains until some time after they were laid (Rec., pp. 14625-14631). And it will be found that Mr. Carter's testimony to the effect that his schedule of street mains does not include mains laid for other companies is pure hearsay (Rec., p. 14631).

There is no justification for the inclusion in the rate base of the "Astoria property," the "Astoria tunnel," and the new 30,000,000 unit at Astoria.

The present suit was instituted by complainant to

have Chapter 125 of the Laws of 1906 adjudicated confiscatory and therefore unconstitutional *as to it*. The question of whether or not the statute is unconstitutional as to the Astoria Light, Heat and Power Company is not in issue here. Nor does it make any difference that the Astoria Company was described or referred to as a manufacturing department of complainant. The Astoria Company is a separate, distinct, individual corporate entity.

Two of complainant's plants on Manhattan Island (14th and 42d Streets), have been eliminated by Judge HAND as obsolete and useless. The other two, at 21st Street and 99th Street, respectively, are kept going during midsummer at a reduced capacity, thus curtailing the extent to which the Astoria plant can be operated (Master's Opinion, Rec., p. 50a).

Complainant offered no evidence of manufacturing operations at Astoria. For the purpose of making comparisons between the cost of making gas at Astoria and at complainant's Manhattan Island plants, the defendant Swann had an examination made of the books of the Astoria Company by an accountant, Andrew Sangster. The results of Mr. Sangster's examination are set forth in his report spread upon the record at pages 11690-11787.

Mr. Sangster did not make an audit of the Astoria Company's books. He did not have access to or examine the books and papers of original entry upon which the Astoria Company's books purport to be based. He simply prepared certain summaries from the company's general books of account without conceding the correctness, or the genuineness or the integrity of the sources of information transcribed into said books. These books of account, which were brought before the Master in compliance with a formal notice to produce served by the defendant Swann, were offered

> *"in so far as they show figures contained in the books, without any assent to their correctness, for the purpose of making tabulations and drawing figures from them for purposes of testimony"* (Rec., p. 11298).

It is upon these books that the Master and Judge HAND have based their findings of complainant's investment in the Astoria property. The items of expense claimed by complainant to be properly included *in its cost of making and distributing gas,* are taken from complainant's books.

Speaking of a tabulation taken from one of the books of the Astoria Company by Mr. Sangster, Mr. O'Brien stated:

> "Before this is put into the record finally, I want to state this, so it will be clear. The defendants do not undertake in offering this tabulation, to take over the burden that has been placed by law upon complainant.
>
> The Master: *Of course not.*
>
> Mr. O'Brien: Of justifying every expenditure, and in that respect justifying the reasonableness, the business wisdom and judgment of their purchases of gas from the Astoria Company.
>
> The Master: *I understand the theory of it.*
>
> Mr. O'Brien: We do not pretend to verify, justify or audit the books of the complainant company. We rely upon our objection, that the complainants have not come forward with any proof as to the wisdom of paying the moneys over that they do to the Astoria Light, Heat & Power Company, every month for the gas received from them, and the analysis we have made is taking the figures as found on the general books, without any concession that they are correct, and without any attempt to go into the underlying data or the ultimate data as referred to by the witness, with a view of making an audit of the books of the company" (Rec., pp. 11688-9).

In view of the circumstances in which the Astoria books were offered, they cannot be taken as evidence for complainant of any facts which it was bound to establish to sustain its case.

Pringle v. *Leverich*, 97 N. Y., 181, 184, 187.
Bailey v. *Francioli*, 101 App. Div. (N. Y.), 140, 144, 145.

For the Astoria property, tunnel and new 30,000,000 unit the Master made the following allowances:

Astoria property	$17,169,342.57
Astoria tunnel	5,178,342.58
One-half the cost of the new 30,000,000 unit	2,250,000.00
Total	$24,597,957.15

The Astoria plant is located on the waterfront at Astoria. It has an area of about 340 acres, only 60 or 70 of which are occupied by the buildings, coal pile, storage of oil and power houses. It is bulkheaded only to the extent that the company is using the property (Rec., pp. 4963-4).

As only between 17 and 20 per cent., approximately, of the Astoria land is used for gas operations, there should be included in the rate base, if at all, only that part of the property actually so employed. Judge HAND, however, held that the defendants were precluded from enforcing this contention by the fact that in 1914 the Public Service Commission approved the Astoria Company's application to issue $14,500,000 of their securities for additions and extensions, and he decided that there must come into the rate base, $14497,615, the

amount expended up to October 31, 1919, on land and fixtures (Rec., pp. 180-a, 181-a). It is true that in *Peo. ex rel. B. L. H. & P. Co.* v. *Stevens*, 203 N. Y., 7, 21, it was stated that the Commission might withhold its consent to expenditures not in the nature of permanent capital and that "Section Sixty-nine of the Public Service Law authorizes issues only in case the expenditures have been reasonably required." But the Astoria expenditures were not for land *now required*. The Astoria site was purchased, not alone for present needs, but for future requirements. The record shows that the plant was established there in anticipation of the time when the City of New York would compel the removal of all gas plants from Manhattan Island (Rec., p. 14028). Future consumers may derive benefit from the use of the land not now employed for gas-making purposes, but present day consumers should not be compelled to bear the burden of carrying it.

As there is nothing in the record to show what proportion the value of the land at Astoria actually used bears to the value of that held for future use, it is impossible in any event to say how much should be deducted from the amount allowed by Judge HAND. For that reason, among others, the judgment should be reversed.

Judge HAND failed to deduct from the investment in the Astoria property the contributions made by the gas consumers to keep the property intact. The depreciation reserve thus set up has not been kept sacred to the use of the public, as the fund has not been credited with its interest. This is clearly shown by Sangster's analysis of the Astoria Renewals and Contingency reserve (Rec., p. 11742), which shows that the Astoria investment should be reduced $4,084,195.66. This important part of Sangster's analysis was not used by Judge HAND.

For the Astoria tunnel Judge HAND allowed $4,400,000. He reaches this figure

By taking the Astoria tunnel at	$5,178,614.58
The Ravenswood tunnel at	700,000.00
"To reach the Ravenswood tunnel the gas must pass through mains on Long Island, valued at	844,422.71"
Total	$6,723,037.29

He continued:

> "All these conduits are formally owned by the East River Gas Company, and are used by others than the Astoria Company. The several corporations have adopted a figure of 57 plus per cent. as representing the plaintiff's proper share of these conduits based upon their relative requirements. * * * However, it appears to me a closer estimate not to take the full valuation of the Astoria tunnel and leave out the Ravenswood and the connecting lines. It is better to treat the whole system of conduits between Astoria and New York as one and to take a percentage of the whole. Past experience indicates 57 per cent. plus, but I shall give my reasons, in considering the 'rate base' for taking it higher and allowing four million, four hundred thousand dollars as the proper allocation" (Rec., p. 167-a).
>
> * * * * * * *
>
> "I have already given my reasons for taking all the conduits used by the Astoria Company rather than the Astoria tunnel alone. For the rate base the figure is fifty-seven per cent. of $6,723,037.29 or $3,832,131.25. However, since the Fourteenth Street and Forty-second Street plants are excluded it is hardly fair to count only fifty-seven per cent. of the value of these conduits as allocatable to the plaintiff. I must assume that all the gas used by it will come through one or

> the other of these conduits except what can be made at Twenty-first Street and Ninenty-ninth Street. This would very substantially increase the proportionate use of the tunnels, but it would be hard to say exactly how much. In taking the valuation of $4,400,000 which is sixty-five per cent. plus, I should be within a safe estimate, and I so take it. I am supposing the Astoria capacity to be raised from fifty to eighty million cubic feet a day" (Rec., pp. 178-a, 179-a).

What has been said about the Astoria land applies to the Astoria tunnel. The tunnel was built not alone for present needs, but in anticipation of requirements a long way in the future.

For the new 30,000,000 unit at Astoria, Judge HAND allowed $4,500,000.

Judge HAND arrived at his figure by concluding that complainant needed the new Astoria unit to supply it with adequate reserve capacity. This may be true, but the new unit was not completed at the time Judge HAND rendered his decision on August 4, 1920, and it was not expected to be finished until December 1, 1920 (Rec., p. 14332). To include in the rate base any part of the cost of the new unit would be to compel complainant's consumers to assume the expense of a plant of which they have not had the use.

West 57th Street Office Building.

This building, which is a three-story and basement stone and brick structure, is located on the north side of West 57th Street, a short distance east of Broadway, which is one of the most expensive realty sections of the City of New York. It has a frontage on West 57th Street of one hundred and twenty feet; a depth on the westerly side of 106′ 11″; on the easterly side of 89′ running irregularly in the rear. The basement is used for

the storage of records. The first or ground floor is occupied by a room used for the exhibition of gas appliances and for office purposes; the second floor has salesmen's rooms, collector's rooms, and a small showroom for the exhibition of gas appliances. The third floor is used for *the storage of radiators* (Rec., p. 11387).

The land for the building was acquired in 1916 (Rec., p. 552). Work on the building was completed in 1918 at a time when everybody everywhere was straining every nerve to meet the high costs engendered by the world war.

The land cost $400,000 and the building $294,718.47.

Defendants contend that the enormous expenditure for this property, incurred at a time when economy and thrift were practised by all but the improvident and the profligate, indicate a decree of reckless extravagance upon the part of complainant's executives for which its consumers should not be made to suffer. Speaking of this contention, Judge HAND said:

> "The Fifty-seventh Street building was built as another office in 1918 and is used only by the company. The question was debated and advice taken upon it, whether it should be a high building or not, and after consulting competent real estate brokers it was decided to build a low building. The defendants complain because that advice was followed. I decline to harry the company with such factious vexations; their discretion may or may not have been right, but there is no ground to say that a clear error was made.
>
> As to the site, the company had the right to build upon a thoroughfare, not on a side street. The public convenience justified it in having its quarters where they would become generally known; it might also have an eye out to the advertisement from such a location. Municipal enterprises wisely select such streets for their enterprises. I allow the sum, land, four hundred

thousand dollars, building, $294,718.47" (Rec., p. 180a).

With great deference to the learned judge, it is not "factious vexation" to urge that complainant's consumers should not be asked to bear the burden of carrying an unduly expensive building, part of which is used for the storage of gas radiators.

In *Cedar Rapids Gas Light Co.* v. *City of Cedar Rapids,* 144 Iowa, 426, affirmed by this Court, 236 U. S., 655, it was held that property which has not absolutely and advantageously been used to serve the public, cannot be included unless the evidence is clear and unmistakable that it is *needed for immediate use.*

Appellants contend that the Court below erred in refusing to take into consideration the extent to which the physical property of appellee has deteriorated through age, wear and tear, obsolescence and inadequacy, as shown by Judge HAND's opinion (Rec., p. 177-a):

> "This calculation makes no allowance for depreciation, although the method by which the present value is reached is from original cost, which, as I have said, should always bear that factor in mind, even though it need not necessarily include it, when the plants have been kept up."

Defendants' Exhibit AA-425 was used in compiling Exhibit AA-426 (Rec., p. 18763), and this table of adjusted book cost, less depreciation, was the basis for arriving at Item 2 in Defendants' Exhibit AA-466 (Rec., p. 13319). In AA-425 the extent of the depreciation that accrued in the period 1905-1918 is shown to be $6,507,400.

From 1905 to 1915, both inclusive, appellee set aside to meet the expense of renewals and to provide for contingencies $15,351,831.29, this sum being collected from

its consumers. This reserve was reduced in the same period by charges against it and by credits to fixed capital account, $5,753,707.08, and by charges as a result of credits on items other than fixed capital retirements, $239,765.52. The balance of this reserve was then closed into "contingency," the amount being $9,358.69 (Rec., p. 18234). This contingency account was increased after 1915 at the rate of five cents per M. cubic feet of gas sold, and at December 31, 1918, it amounted to $11,801,659.48 as compared with the amount of $6,507,400 which Defendants' Exhibit AA-425 shows should have been set aside to meet that depreciation which had occurred despite the actual expenditures for renewals and repairs.

In addition to this huge reserve of $11,801,659.48, appellee has set up since 1915, in the account "Renewals and Replacements," credits amounting to $2,006,857.83, of which amount $1,833,213.38 was charged to the reserve and credited to fixed capital retirements, while $74,963.10 was charged to the reserve as the result of credits to other than fixed capital retirements. This section of the new account, entitled "Renewal and Replacements," therefore had no balance at the end of 1918. The charge to operating expense and credit to reserve has been at the rate of three cents per M. cubic feet since 1915 for "Renewals and Replacements," and at the rate of five cents per M. cubic feet for "contingency," as against ten cents prior to 1915 for the joint account, "Renewals and Contingency" (Defendants' Ex. AA-243, Rec., p. 18234).

It may be of interest to the Court to note that this exhibit shows this huge reserve for contingencies, amounting to $11,801,659.48, has grown gradually since 1905 by charges to operating expenses which the consumers paid. The book account has not been increased by reason of the compound interest that has been or

which could have been secured from the use of such money.

This Court has very definitely decided that the items composing a public utility plant depreciate *in value* from year to year in a varying degree, and that it is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages, *with different expectations of life.* In *Knoxville* v. *Knoxville Water Co.*, 212 U. S., p. 1, the Court says:

> "The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate, for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, stand-pipes, pumps, boilers, meters, tools and appliances of every kind, begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages, with different expectations of life."

Judge HAND was of the opinion that physical deterioration may be offset by theoretical appreciation occasioned by a rise in the prices of materials used in the construction of gas plants. Former Justice HUGHES, who wrote the opinion in the *Minnesota* rate cases, and later acted as referee in the *Brooklyn Borough Gas Company* case, said, in the latter:

> "A public service corporation is entitled to be reasonably compensated for its service and the actual cost of its operations must always be taken into consideration in determining whether or not it receives a fair compensation above that cost. But it is a different thing, after cost has been defrayed, and the question is as to the compensation to be allowed in excess of cost, to take as

> the basis for a compensatory return an asserted plant value, far above the actual investment, which is reached merely by expert estimates of cost of reproduction under abnormal conditions. This would result in allowing a public service corporation to take advantage of a public calamity by increasing its rates above what would be a liberal return not only on actual investment, but upon a normal reproduction cost, in the view that unless it could make an essentially exorbitant demand upon the public it would be deprived of its property without due process of law. The enforcement of the constitutional guaranty does not require the application of any artificial formula. It has been constantly pointed out that the rate base must be what is called the 'fair value of the property,' and that as to this there must be a reasonable judgment based upon a proper consideration of all relevant facts" (P. U. R., 1918, F, 335).

Appellant contends, on authority, that depreciation results from age, wear and tear, and through functional deterioration, that renewals and repairs cannot maintain a gas property in 100 per cent. condition, owing to the fact that items of worn out plant have different expectations of life, which in some cases are as great as 100 years, making it impossible for the public service corporation to periodically renew depreciated units. All gas plants have a composite age and a composite life expectancy. Prudent operation calls for the setting aside of reserves so that long-life property, of a certain age but not immediately ready for retirement, can be credited to capital account at the end of its life without loss to the investors. The executive committee of appellee has recognized this patent fact and has set up a reserve of $11,801,659.49. We contend this was not all set aside to keep the physical property intact, but was in part charged against the consumers so that in the event of a contingency the surplus would be available during lean

years for paying interest on the investment. Such a contingency appeared during and following the World War, and it follows that if, in the year 1919, there was a falling off in the net income, due to abnormal conditions, the investors were amply protected by this contingency fund. The deduction of accrued depreciation from cost new is necessary when fixing a rate base predicated on the sacrifice made by the investors, particularly where the enterprise has admittedly been successful from its inception, and where it has taken from the consumers all operating costs—reasonable or otherwise—the expense for taxes, repairs, renewals and replacements, and has set up a renewal and contingency reserve of close to $12,000,000—on which reserve the consumers have had no benefit due to interest earned in the past fifteen years.

X.

This Court should not declare the statute unconstitutional unless it finds that complainant is unable to earn a return *which is security for its investment.*

It is respectfully submitted that the judicial function is confined solely to maintaining the security of property, *not guaranteeing a profitable use of it.* Whether or not a rate of return for a public utility is sufficiently attractive to induce investors to risk putting their money into it, is, under our governmental system, confined to legislative wisdom. It is only when the rate has become so low as to endanger the safety of the investment that the courts may interpose and declare it confiscatory.

Mr. Justice HARLAN, writing the opinion of a unanimous Court, said:

> "It should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation, as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

San Diego L. & T. Co. v. *National City,* 174 U. S., 739, 754, and cases there cited.

At page 756 the Court further said:

> "This Court had previously held in *Covington & Lexington T. R. Co.* v. *Sanford*, 164 U. S., 597, 598—which case involved the reasonableness of rates established by legislative enactment for a turnpike company—that a corporation performing public services *was not entitled*, as of right and without reference to the interests of the public, *to realize a given per cent. upon its capital stock;* that stockholders were not the only persons whose rights or interests were to be considered; *and that the rights of the public were not* to be ignored. * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exercising its general powers, is that it receives what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public."

In *San Diego L. & T. Co.* v. *Jasper*, 189 U. S., 439, and *Southern Pac. Co.* v. *Bartine*, 170 Fed. Rep., 725, it was held that while the rate may not yield a reasonable return, yet it may not be confiscatory.

Complainant may protest that less than 8 per cent. found by the Master is an unreasonable return upon its investment. Individual opinions upon this subject will of course differ. But until the courts can see that the unreasonableness of the rate has reached the point of endangering the security of the investment, they are without power to interfere.

There is nothing in

> *Lincoln Gas, etc., Co.* v. *Lincoln*, 250 U. S., 256,

decided June, 1919, which is applicable to the instant case.

In the *Lincoln* case 8 per cent. was mentioned by this Court upon several grounds:

1. The Lincoln Company "had not such a monopoly nor were its profits virtually guaranteed in such a sense as to permit the public authorities to restrict it to a return of 6 per cent. upon its invested capital" (p. 267).

2. Changed conditions due to the abnormal situation created by the World War appeared to this Court to justify it in holding that a rate of 6 per cent., as in the case of a sure monopoly like complainant's, was not sufficient to guarantee the security of the company's investment.

3. In Nebraska the legal rate of interest is 7 per cent. In the State of New York it is 6 and remained at that rate during the war.

Since the *Lincoln* case was decided, conditions have changed. Capital everywhere throughout the country is rapidly recovering from its depression. At least it cannot truthfully be said that the abnormal conditions which prevailed during the war and for some time after the armistice still exist to the extent that the security of complainant's invested capital has become endangered. Even while the war was in progress many commissions and courts throughout the United States declined to advance the rates charged by public utilities upon the ground that to do so would unjustly shift to a comparatively limited class the sacrifices and hardships endured by all.

The New Jersey Board of Public Utility Commissioners held (P. U. Reports, 1918, Vol. E, p. 915):

> "During the war period and in accordance with national and state war policies while in underwriting normal returns for public utilities we should allow rates sufficient to keep the utility solvent and in good operating condition, we must also continue

> our declared policy of disallowing rates in war times for the purpose of increasing dividends. Stockholders in such corporations must share in the burdens and hardships resulting from financial changes due to the war and cannot expect to wholly escape therefrom."

The Indiana Public Service Commission held, *In re Union City Telephone Company* (P. U. Reports, 1918, E, p. 669):

> "The Commission recognizes that during the years of 1916 and 1917 there were marked and unprecedented advances in the prices of materials. It also recognizes the fact that 1917 prices are abnormally high. At this point it will be remembered that the petitioner is asking for a permanent increase in rates. It is obvious that 1917 prices were war prices and therefore temporary prices. The Commission takes the position that it will not grant 'permanent' rate increases based upon 'temporary war conditions.'"

The New York Commission held that in war time a utility should not expect to retain its normal rate of return, thereby shifting to its patrons all the burden of war times.

Long Island Railway Co., 1918, P. U. R., 651.

The Utah Public Utilities Commission held that a utility should not during the abnormal conditions caused by the war, be permitted to increase its rate to produce as great a net revenue as when conditions are normal, since the utility should bear a portion of the burden caused by war (P. U. R., 1918, B, 497).

The Indiana Commission held that it would not in any circumstances permit utilities to capitalize the war or use any claim for a temporary emergency rate as a means of securing an unjust rate, or to thereby permanently estab-

lish higher rates (see *Indiana and Cincinnati Traction Co.*, P. U. R., 1918, C, 761).

The West Virginia Commission held that:

> "The expense of operation incident to war conditions is necessarily abnormal and temporary, and this burden should not be borne alone by the shipper, but in part by the carrier as well" (*Re Winifrede R. Co.*, P. U. R., 1918, C. 156).

The California Railroad Commission (*In re Northern California Power Co.*, P. U. R., 1918, C, 394) held that:

> "Utilities should not expect the public to bear the entire burden of prevailing abnormally high prices due to war conditions."

And the Commission made this statement:

> "The Commission, in considering this and other applications of this kind at the present time, recognizes the abnormal conditions under which public utilities are laboring, and seeks to afford such relief as is fair and reasonable. However, utilities should certainly not expect the public to bear all the burden of prevailing abnormally high prices due to war conditions, nor ask that *they be permitted to earn the same returns that might reasonably be expected under normal conditions. The applicant herein recognizes this fact, and states that it will be satisfied if permitted to increase its rates only to meet the increased cost of oil.* It states that there has been a general increase in the cost of other materials and supplies used in the manufacture of gas, but it introduced no detailed evidence to show the amount of such increases."

And see cases cited and discussed in Point II.

In the prior suit, Mr. Justice PECKHAM, speaking for this Court said:

> "There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality. In this particular case with reference to the risk attending the business and the locality where it is carried on, the complainant is entitled to a return, if it is possible, of 6 per cent. upon the fair value of its property actually used in its business of supplying gas."
>
> *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 20.

Complainant has frequently loaned millions of dollars to its affiliated companies at 6 per cent. (Rec., pp. 8542, 8544).

Between the time the prior suit was decided and the service of its complaint herein, in or about January, 1919 (Rec., p. 9-a), complainant made no claim that it was unable to earn an adequate return upon its investment.

Even the Master, with all his bias against the statute, conceded:

> "* * * there won't be and cannot be any evidence which would justify a finding that they did not get a fair return down to December 31, 1917" (Rec., p. 11117).

In the instant case, Judge HAND made findings based upon 6 per cent. and 7 per cent. (Rec., p. 149a). Appellee has assigned no errors in any of these findings. The question, therefore, of whether or not it is entitled to a

higher rate than Judge HAND allowed is not, it is respectfully submitted, properly before this Court.

The legal rate of interest permitted in New York State, 6 per cent., is the maximum profit that can be collected for the use of money in that State. The maximum rate of interest is profit; the minimum is security and with security alone are the courts concerned.

It is respectfully submitted that the Court below erred in not holding that during the war period (1918-1919) in The City of New York a return of from 4 to 4¾ per cent. upon the fair value of appellee's property used in the gas business was not confiscatory. Four and three-quarters per cent. is the highest rate of return which the United States pays its citizens on investments of approximately $35,000,000,000 in Liberty Bonds. Four and three-quarters per cent. was a fair return during the unusual and abnormal period which existed in the two years (1918-1919) to which the taking of testimony in the instant case was confined.

XI.

Judge Hand's conclusion on the reasonable cost of production in 1918 and 1919 is based upon an erroneous conception of the evidence.

In considering the cost to appellee of making gas, so as to compare it with the rate, the court below differed from the findings of the Master and set up figures which are not justified by the record. Leaving out of our discussion at this point all reference to the substitution of the chamber-oven system of making coal gas, that was advocated by defendants' expert, A. S. B. Little, we will endeavor to show that the court below did not grasp the significance of the figures and facts in the record relating to the reasonable cost of production. The learned judge adopted the plan of taking the Astoria Light, Heat & Power Company's production costs at House A for coal gas and at House C for water gas, as shown by the following abstract of his opinion:

> "That is a plant over ten years old, but it may, I think, be safely taken as a proper standard. Certainly Mr. Little thought that for coal gas, House A, and for water gas House C, were suitable. He thought House B not economical because of the absence of certain labor-saving devices, though the item for labor was greater for House A in his estimates, but of House A he made no complaint.
>
> I shall therefore take the analysis of the costs at House A for coal-gas and House C for water-gas as taken from the Astoria books for the full year 1918 and for the first eight months of 1919. Sangster, the defendants' accountant, was given full opportunity to examine these and to check their accuracy and his tables I use. His results must be accepted as true and valid, except in so far as any of the practise in that house can suc-

> cessfully be criticized. I know of no such possible criticism unless it be the amounts of materials used and the extent to which the houses were driven. The second point comes up for consideration later and upon the first I shall say but little" (Rec., pp. 159a, 160a).

The first palpable error of the court to which we direct attention relates to the quantity of bituminous coal required in the production of each thousand feet of coal gas. Judge HAND says:

> "Now Mr. Woods' estimate of bituminous coal for coal gas was indeed only two hundred pounds and that was ample before 1916, but in 1918 House A in Astoria used by Sangster's tables 207.6 pounds, and in 1919 nearly 211.5. These figures seem too large and would have been so in the earlier years, but Mr. Little himself thought Woods' estimate too low at the present time and insisted that two hundred and seven pounds was necessary, substantially the Astoria practise in 1918, and near enough to that in 1919, not to justify suspicion" (p. 160a).

In view of the many places in the record wherein Little testified to less than the reported amount of coal being required, and in the entire absence of any such contradictory testimony as is shown hereinabove to be relied upon by the court, we feel confident that this Court will seek to ascertain where Judge HAND secured such misleading information. In the record of March 22, 1920 (p. 15494) counsel for appellee referred to the amount of bituminous coal required to make coal gas, as follows:

> "I do not know the way the particular figures you refer to are made up, but taking Astoria, either of the plants, taking either the Central Union and the other testimony in the case, it seems that 200 is a low figure. In fact, as I recall Mr. Little's tes-

> timony, Mr. Little said that 200 was too low, it was better than anybody else that he knew of was doing in the country, and that he would not put down in his table as low a figure as 200; and he put 207, I think" (see also 15492-3).

Counsel for appellee aggravated this misstatement when he submitted a "memorandum" to the Master discussing several points referred to upon oral argument. It contains the following (p. 44):

> "For example, Mr. Little testified that 200 pounds of gas coal per thousand cubic feet of gas made was too low a quantity and that he would not make computations based on so inadequate a figure. He indicated that at least 207 pounds or more would be required."

Referring to the record we find that Little testified:

> "With 8-hour charges the yield of gas, from fair Eastern gas coal, should not be less than 5.5 feet per pound carbonized" (Rec., p. 11195).

That is equivalent to 181.8 pounds of coal per 1000 cubic feet of gas produced. He further testified:

> "With 8-hour charges on good coal, in horizontal retorts, the production should equal 5.55 feet per pound, as there is less degradation of the gas than in an inclined retort" (Rec., p. 11196).

That is equivalent to 180.18 pounds of coal per thousand cubic feet of gas produced.

In the table appearing on pages 11210-11 of the record, Little proposed to make 3,113,750,000 cubic feet of gas in the inclined retort House A, using 600,000,000 pounds of coal, which is equivalent to 5.1896 feet per pound, or approximately 192 pounds of coal per thousand cubic feet of gas. This shows, incidentally, that

Little's estimates of cost were very conservative. He thought that, in good operation, with present day quality of coal 181.8 pounds would suffice; but he allowed 192 plus.

On pages 11221-2, Little's testimony clearly shows he proposed to make, in the House B, 3,165,027,000 feet of gas with the use of 600,000,000 pounds of coal, which is equivalent to 5.275 cubic feet per pound, or approximately 190 pounds of coal per thousand cubic feet of gas.

As showing that Little did in fact criticize operations of both of the coal gas plants at Astoria, Houses A and B, and to further prove that counsel for appellee had no justification for asserting that Little by his testimony claimed the company should use more than 200 pounds of coal per thousand cubic feet of gas made, the following abstract is taken from the record (pp. 11358-59):

> "*By Mr. Ransom.*
>
> Q. Is it not a fact that the gas engineers of the country have generally found that you could not get as high results as that from a pound of coal? A. You ask a gas man what he is getting and he says five feet and he don't know whether he is or not—half of them. That is talk around conventions that no man who respects himself pays any attention to.
>
> Q. Suppose you ask a gas man how much he is getting and he says five and a half feet, does he know any better? A. No, but when he shows me on the books I believe him. How much is he selling, not how much he is making. How much is he selling plus his leakage. How much is he getting in dollars, that is what I want to know—not how much a man says he ought to make or how much he could make.
>
> Q. Then you put the emphasis on the actual experience of the plant? A. Properly run, yes, certainly.

Q. And you criticise in that respect the operation of all of the plants of the complainant at Astoria? A. I venture to do so, yes."

The testimony that was so garbled by counsel for appellee did not relate to coal used for carbonizing purposes, but to coke that is used for bench fuel. Little evidently had the intention of casting doubt on the accuracy of the books when he volunteered the statement about more coke being required for bench fuel to heat the retorts and carbonize the coal.

"Q. We will get to that in a minute. Up to what time would you say the Astoria plant was modern? A. Well, at least six years ago, and I am confining it now to the horizontal house.

Q. The A. House is very good? A. The A. House is good, there is no doubt about that.

The Master: Does that comply with your ideas?

The Witness: Yes, sir.

Q. The best there is? A. No.

The Master: As good as there is?

The Witness: No, it is not. The charging arrangements are faulty.

Q. That is, you think they should have some more of this labor-saving machinery? A. Yes, I certainly do.

Q. But aside from that it is pretty good? A. Pretty good, yes, it is. It is running well and doing better than I can do on that bench fuel, or better than anybody else in the United States or even in the whole world can do on bench fuel.

Q. Than you have done? A. Than they report they do.

Q. What? A. Than the company's books report they do.

Mr. Ransom: I did not catch that statement.

The Master: Than the company's books say they do.

Q. According to the company's books of quantities and results, they are doing better— A. On bench fuel.

Q. They are doing better than anybody in the country? A. They say they are.

Q. Well, according to those books? A. Yes, according to the books. I have not used the books in setting up my statement. I have given you a reasonable amount of coke to heat those retorts. You can't do it with 207 pounds of bench fuel. I say that because I want to show that I have not been one-sided at all in this matter" (Rec., pp. 11363-4).

While we readily concede that our engineer very frankly stated, in reference to House A., that it is a well designed and substantially constructed retort house, we respectfully refer to his testimony at this point, and in fact at every other part of the record, to show that he condemned the manner in which it is operated. The 207 pounds of coke for bench fuel, we may here add, has nothing in common with coal for carbonizing purposes. When 200 pounds of coal is referred to it means that each M. cubic feet of gas required approximately that amount, whereas the 207 pounds of bench fuel means that amount of coke is needed per ton of coal carbonized. The coal goes into the retorts—the coke goes under the retorts to heat them and carbonize the coal.

The learned Judge took the production cost figures appearing in Sangster's analysis of the Astoria books. In the record it is shown (p. 11706) that in the A. House, in the year 1918, there was used 207.667 pounds of bituminous coal for each thousand feet of gas made. In the first eight months of 1919 the showing in House A. was

even worse, being at the rate of 211.536 pounds of gas coal for each thousand cubic feet of gas made. This deplorable performance may account for the desperate desire of appellee's counsel to distort the record, as he did in his argument and memorandum, in the manner hereinbefore shown. Even the company's engineer of manufacture, George E. Woods, could not stand back of the figures in the Astoria books. This excessive use of coal at a time the company attempted to show there was a shortage of gas coal, convicts it of gross negligence and incompetency. In his hypothetical plant, Woods advocated the use of 200 pounds of gas coal. Sangster corroborated Little in reference to the unreliability of the books in the matter of bench fuel used to carbonize the coal as is shown below:

> "There is no actual measurement of the fuel used under the retorts as I understand it, but after adding up all the other quantities used and sold, the balance to be accounted for is charged to fuel for benches at $4.25 per load" (Rec., p. 11708).

That testimony fully explains the reported use of only 207 pounds of bench fuel per ton of coal carbonized. More was undoubtedly used, but it follows that there was less used in other parts of the plant, possibly in the boiler houses. If the book costs for bench fuel are raised, those for boiler fuel should be proportionately reduced. Appellee endeavored to get the lower court to believe that House A. is about the last word in the design of a coal gas plant. In this connection we respectfully refer to page 15493 of the record, where the report of a discussion appears on the suggested use of 200 pounds of coal to produce 1,000 feet of coal gas:

> "Mr. Hayward: Well, at the moment, all I can say on this poor old obsolete 14th Street station

is that they beat that record year after year. Here is 1911, 198; here is 1914, 197, and so on.

The Master: What exhibit are you referring to?

Mr. Hayward: That is exhibit——

Mr. Clark: 126A of ours.

Mr. Hayward: Schedule 126A; we will get the number of the exhibit—42nd Street, which is obviously not a fair test because of its antiquity and obsolescence, they show 189, 175, etc.—unless I read these exhibits wrong. Maybe I am not able to read the English language. You told me they had changed all the law while I was in France; I didn't know they had changed arithmetic and the English language much.

The Master: What have you to say about that, Judge Ransom?

Mr. Ransom: That is the best demonstration that perhaps has yet taken place in the case of the fact that the 14th Street and 42nd Street plants are just as Mr. Woods has claimed, highly efficient plants with respect to a gas produced from given quantities of coal.

The Master: Colonel Hayward is right, that the records show at 14th Street and 42nd Street it did not take 200 pounds" (Rec., pp. 15493-4).

Here again counsel for appellee put a construction on certain statements which are not borne out by the record. Reference to page 18610 shows that the 14th Street plant used, in 1914, 197.653 pounds of caking coal per M. cubic feet of gas made, but in 1918 it used 254.481 pounds (Rec., p. 18618). Also it may be noted that in 1906 there was used at 42nd Street plant, 189.968 pounds (Rec., p. 18620), in 1907, 175.038 pounds (Rec., p. 18622), but in 1916 the amount increased to 230.71 pounds (Rec., p. 18640), and in 1919 it was 211.262 pounds per M. cubic feet of gas made (Rec., p. 18644).

The argument is unanswerable that Woods' figure of 200 pounds for coal gas is too high, that Little's figure

of 192 pounds is more than sufficient and his earlier contention that 180.18 is ample is more than substantiated by the results obtained from coal carbonized at the obsolete coal gas plants in Manhattan. It necessarily follows that the reported costs to produce coal gas in House A. are above what fair-minded men would concede to be reasonable. The coal used is in excess of what either Woods or Little considered fair, and is greater than was needed in some years on the decrepit and obsolete free-fired retort benches at 14th Street and 42nd Street. To what extent does this erroneous conclusion of the lower court affect the finding of fair cost? This cannot be ascertained by merely reducing the quantity of coal to the fair amount. The retorts would not in fact carbonize less coal, but would make more gas from the coal actually used.

The learned Judge took as his base price for coal gas $.4155 per M. cubic feet, using the figure given by Sangster on page 11720 of the record ($.41547 to be exact). Judge HAND did this notwithstanding the admitted fact that an eight months' tabulation of operating expense cannot form a true picture of a year's operations. He passes lightly over the fact that in the year 1918 the comparative figure to $.41547 was $.31537. However, we make this part of our argument solely on the basis of Judge HAND's findings, to ascertain the effect of the misleading statement of appellee's counsel. The coal gas cost of $.41547 per M. cubic feet is the result of dividing the cost in dollars by the production in M. cubic feet. It is shown on p. 11751 of the record that 174,977.55 gross tons of coal made only 1,852,877 M. cubic feet of gas (R., p. 11752).

If there had been produced 5.5 feet of gas per pound of coal carbonized (and this it will be conceded is a conservative estimate when it is noted that only 14.59 average candle power gas was produced (R., p. 11698)

then the quantity of gas produced from exactly the same amount of labor, bench fuel, etc., would have been 2,155,723 M. cubic feet instead of 1,852,877 M. This means that the cost per M. feet would not have been $.41547 but $.3571.

The figure of the lower court for House A, $.4155, includes $.11553 per M. for enrichment (R., p. 11720). Sangster's figures, as used by the learned Judge, evidently need some explaining. He used the same cost for enriching the gas from House A as from House B, based on 1.86 gallons of oil per M. cubic feet of gas made. He makes no allowance for the fact that the candle power of the A gas is higher than for the B gas (R., p. 11698). He does not take into consideration that the oil used to enrich the gas produces about 80 feet of gas per gallon of oil used. Woods' figure for enrichment was based on 1.6 gallons of oil to enrich each M. cubic feet of coal gas. This figure the Master accepted as against 1.86 gallons used by the Court. Little's estimate to enrich 16 candle power coal gas was 1.25 gallons of oil. The Master found that the fair cost of oil for 1919 was 6.9 cents per gallon. Assuming 1.6 as against 1.86, a difference of .26 of a gallon, and using 6.9 cents per gallon, the court's finding of $.11553 should be reduced by $.01794 per M. cubic feet, thus amending our corrected figure of .$3571 to $.33916. In order to give appellee the benefit of every doubt, we might say that on these corrections alone, with allowance for some additional oxide of iron and water that might be required for the greater amount of gas produced, and with consideration given to the slightly less tar oil recovered through the use of less enriching oil, the fair cost of coal gas should not exceed $.35 per M. cubic feet. This figure relates only to the first eight months of 1919. We are convinced this Court will reject

any suggestion that this should be made the standard for a finding that the statutory rate is confiscatory. A fraction of a year cannot reflect the fair cost of operation in any plant. At the end of the year, when inventories are taken, there may be required, in even the best managed plants, an adjustment of costs due to differences between actual and book inventories of stocks. Part of a year should not be relied upon in making a finding that the statute is confiscatory, particularly where the Government's necessary interference with the operations of the plants in 1918 was still noticeable in the first eight months of 1919. We therefore analyze Sangster's figures for 1918 as we have for the first eight months of 1919. His cost is $.31537 per M. feet for House A in 1918. In that year 175,694.81 tons of coal were used to produce 1,895,126 M. cubic feet of gas, or 207.667 pounds of coal per thousand (R., pp. 11750-1). Assuming 5.5 feet per pound the production would have been 2,164,560 M. cubic feet instead of 1,895,126 M. The cost of $.31537 should therefore be $.2761 per thousand cubic feet of gas made. Sangster used 1.72 gallons of oil to enrich each M. cubic feet of coal gas in 1918 (R. 11712). The difference between 1.72 and 1.6 is .12 of a gallon and at 6.5 cents per gallon the deduction from the amended figure of $.2761 would be .78 cents, making the correct cost $.2683 per M. cubic feet. To be on the safe side and for reasons already given, we may call this $.28 per M. cubic feet. If we averaged the 28 cents and the 35 cents we would get a cost for coal gas of $.315 per M. cubic feet during the 20 months. We have made no allowance herein for the fact that whereas the book cost of coal increased 18.59 per cent. in 1919, the Astoria Company made no increase in the price of coke residual sold the subsidiary companies (R., p. 11709).

Taking up now the court's findings on the cost of water gas made at House C, it is stated, in the opinion of Judge HAND:

> "As respects water gas the necessary amount of oil to be used is not much in dispute, at least so I understand it. It is true that the average in the Manhattan plants has gone up from 3.80 gallons in 1913 to 4.1 in 1919, but that is less than eight per cent. increase, easily accounted for by a change in quality. It is noteworthy that in 1915, long before this suit was in contemplation the quantity used in the Manhattan plants was 4.06, substantially what it is now at Astoria" (Rec., p. 160a).

There is no justification for the conclusion that gas consumers ought now to pay for the use of more oil in the gas on account of a depreciation in the quality of the oil. The contracts of appellee with the Standard Oil Company of New Jersey invariably contain the following:

> "1. The party of the first part hereby sells * * * gallons of a homogeneous gas oil of not less than 28 degrees gravity, Baume, and of a quality equivalent for gas-making purposes to similar gravities received by the gas company during the year prior to the date of this contract. * * *." (R., pp. 16472-16479.)

There is no evidence that appellee complained to the Standard Oil Company of New Jersey that the oil delivered in 1918 and 1919 was of inferior quality to that delivered in 1917 or 1916.

The lower court, as noted hereinbefore, decided that the Astoria House C used substantially 4.06 gallons of oil per thousand feet of gas. He does not explain, however, why he figured 4.06 for the modern gas making plant at Astoria, considering that the old 99th Street plant used only 3.893 gallons per M. cubic feet (R., p. 18690). Coun-

sel for appellee stated in an elaborate and uncalled for memorandum that he submitted to the Master:

> "During the twelve months of 1918, the water gas plants of the Consolidated Company used 4.13 gallons of gas oil; during the eight months of 1919, 4.09 gallons; during 1917, 4.16 gallons; during 1916, 4.11 gallons, and during 1915, 4.17 gallons.
>
> At the water gas plant of the Astoria Light, Heat and Power Company there was used, during the 12 months of 1918, 4.12 gallons of gas oil, and during the eight months of 1919 the same quantity of gas oil."

Concerning the statement that the water gas plants of appellee used 4.13 gallons per M. in 1918, it is to be noted that the 21st Street plant used 4.189 (R., p. 18670) and the 99th Street plant 3.863 (R., p. 18696).

Counsel for appellee contradicts the conclusion of the learned Judge who said the Manhattan plants used 4.06 gallons in 1915 and that that was substantially the amount used by the Astoria House C. in 1919. As shown above, counsel contended 4.17 gallons were used in 1915. We note from page 18664 of the record that the 21st Street plant in Manhattan used 4.226 gallons of oil in 1915, whereas the 99th Street plant used only 3.893 gallons. (R., p. 18690). If we use Sangster's analysis of House C. at Astoria, we note (R., p. 11756) the reported use of 4.7461 gallons per thousand in the first eight months of 1919. This, of course, includes extra oil used in the water gas to enrich some of the coal gas. Inasmuch as we have added to the coal gas cost the expense for oil used to enrich it, we must take out of the water gas cost at House C. the excess oil so used. This was done by Sangster (R., p. 11725) when he reached the figure of 3.979 gallons of oil per thousand cubic feet of gas made. The Learned Judge, perhaps unconsciously, used this calculation of Sangster, because he took the cost to produce

gas as found by defendants' accountant, viz.: $.44746 per M. feet (R., p. 11728) which includes $.27149 per M. for oil (R., p. 11727) and this ties in with the figures on page 11725 of the record. With this conclusion of the court regarding the quantity of oil, we are able to agree, although he did not use what he thought he ought to use in his calculations. The price paid for gas oil is challenged by us, but on that point our contentions are stated in another part of this brief.

The court below deducted .9 cents per thousand feet from Sangster's figures to adjust the excess quantity of generator fuel used in House C. as compared with the Manhattan plants. On this point the learned Judge said:

> "Whether Astoria got worse coal or what was the reason I do not know" (R., p. 160a).

We cite this merely as another indication of the lack of grasp that the court below had of the facts. Reference to page 11721 of the record shows that House C. used hardly any generator coal, but did in fact consume large quantities of the inferior coke produced in the coal gas plants at Astoria. Of this coke Little said:

> "The Astoria Coke that I observed was very small in size and contained an excess of moisture, but it was otherwise of good quality. To be on the safe side I have allowed for the use of 32 pounds of coke per M. feet of gas, as generator fuel" (R., p. 11231).

The difference between 36.43 pounds and 32 is 4.43 pounds per M feet, and figuring this at only $6 per short ton, the reduction in the cost of water gas should be 1.324 cents per M instead of .9 cents. The cost shown by Sangster should therefore be reduced to $.43422 as against the figure of $.43846 used by Judge Hand. The final figure for water gas used in the computations of the

court below is not much in dispute except for the inordinate cost of gas oil per gallon, and this subject we discuss in detail elsewhere in this brief. We shall not bother this Court by taking up every item in Judge HAND's opinion covering water gas costs, but will point to his statement:

> "Little's figure for * * * water gas at House C. $.396. * * * As to the cost of materials, the chief difference is the price of oil. Thus the difference for oil alone is $.03149, making the cost of water gas $.4275 if so corrected, as against $.43846" (R., p. 161a).

Now, Little used a cost of 6 cents per gallon for oil. He did not pass upon the fairness of that cost although he was prepared to testify that it was higher than other companies paid. In Sangster's figures the average cost for 8 months of 1919 was 6.8231 cents per gallon, but he showed that whereas the price was 7.5927 cents in January and February, 1919, and 7.6082 in March, the price was coming down and from April to August 31, 1919, it averaged 6.1082 cents per gallon (R., p. 11724). It would, therefore, seem that it would have been fairer for the Court to use the gas engineer's figure of $.396 per M. cubic feet of water gas made than to take the average shown by the books for the first eight month of 1919—— A purely arbitrary period which should not be controlling when figuring the fair cost of gas.

In order to follow the reasoning of Judge HAND in his opinion of the fair cost of production we find it necessary and instructive to discuss his conclusions on Little's testimony at some length.

Speaking of the cost of coal gas, the learned Judge says:

> "The apparent difference is much more marked in the coal gas made in House A., but most of it is in oil, repairs and the like. For example, there is a difference of $.0477 in the cost of enrichment

alone, which certainly should be taken on the basis of the actual amounts paid for oil and the necessary amounts used" (R., p. 161a).

It is somewhat astonishing to find that Judge HAND did not himself do what he said the witness Little should have done. By reference to Sangster's analysis, which the court below used, we find that the expert accountant did not accept the "actual amounts paid for oil and the necessary amounts used." Judge HAND's figures on the cost of enrichment should not be taken as against the expert judgment of either Woods or Little. Sangster testified:

> "For the purpose of adjusting the cost of coal gas mixed with water gas at Astoria, I will submit a computation, admittedly rough—based upon information obtained from the company's records and vouchers. * * * This may give some indication of the quantity of gas sent to Ravenswood from each plant in order to get the c. p. of the total gas sent, but as I propose to rely on the average of 1.86 gallons per thousand cubic feet for the eight months, I have not worked out the c. p. even although the statistics on pages 7 and 8 would indicate that the oil average is somewhat high compared with the previous year" (R., pp. 11711-13).

Little testified:

> "Cost of enriching. The company does not show this cost separated from the water gas carburetting cost in the plant A operations. I have proceeded on the assumption based upon good practice, that to enrich 7½ candles there would be required oil, producing in the water gas 6 candles per gallon of oil used" (R., pp. 11218-9).

First we see, therefore, that neither Sangster nor Little could use the book figures because no such separation

of enrichment cost appears in the Astoria reports. Next we can point to the fact that Sangster used the same cost to enrich gas from House A. as from House B., although the candle power of the A. gas was higher than the B. gas and required less enriching. Third, we point to the undisputed testimony of Little that the A. House could have produced 16 candle power coal gas whereas it only produced 14.59 candle power, and B. House only 13.21 (R., p. 11698). Little assumed an efficiency of only 6 candles per gallon from the oil, and this figure for enrichment was evidently considered reasonable by appellee because no attempt was made to discredit it.

We therefore fail to find any justification for the opinion of Judge HAND in reference to the cost of enrichment. Even Woods, who testified for appellee, suggested the use of only 1.6 gallons of oil to enrich the coal gas made on his hypothetical 10 million foot plant (R., p. 16590). It is also interesting to note that Woods' cost of oil is only 6.1 cents per gallon. His theoretical cost of enrichment is only $.0876 net per M. feet as against Sangster's $.11295. The learned Judge says there is a difference between Little's figures and the book costs of $.0477. There are no book costs, but if he refers to Sangster's computations as shown in the analysis of cost, then the difference between Sangster's $.11553 (R., p. 11720) and Little's $.0678 (R., p. 11212) is $.04773. But, on the other hand, Woods testified that the cost should not exceed $.[illegible]3676 (R., p. 16590). At the most there should be added to Little's cost of $.28 per M. feet, the difference between his figure of $.0678 and Woods' figure of $.0876, or $.0198, making the adjusted cost only $.2998 per M. cubic feet. The opinion next states:

> "Again for electric power superintendence and repairs he allows only $.0255 in all (as I figure the several items), as against actual expenses of $.08309, a difference of $.0576" (R., p. 161a).

We assume the opinion of the Judge is based on the following figures:

LITTLE'S ESTIMATE

Superintendence	$.0048816	(R., p. 11210)
Power & Light	.0020000	(" 11211)
Repairs	.0185678	(" 11211)
Totals of above	$.0254494	

SANGSTER'S ANALYSIS

Superintendence	$.00599	(R., p. 11702)
Power & Light	.01576	(" 11718)
Repairs	.06134	(" 11719)
Totals of above	$.08309	

Why the Judge made use of such a grouping of figures we do not know. It would have been equally efficacious from his point of view to refer to the repair item, and in that event his conclusions would have been less confusing.

As to repairs, some illuminating information may be gleaned from Sangster's testimony:

> "Owing to the unusually heavy expense at Plant B, particularly in 1919, these costs should not be accepted as indicating average repairs. What should be a fair average under present conditions is a matter of judgment depending upon a knowledge of the average increase in the price of materials and in the rates for the class of labor employed in this kind of work" (R., p. 11719).

Sangster then directed attention to a table of comparative costs for repairs at works for some years in

the past experience of the company. This is summarized below:

Summary of Sangster's Table X (R., p. 11760).

Repairs to apparatus per M. cubic feet, not including any division of repairs incurred jointly for A and B.

Year	Plant A.	Plant B.	Plant C.
1912	$.021719	$.026675	$.012277
1913	.029926	.058513	.015711
1914	.028972	.043215	.011360
1915	.021709	.031032	.008310
1916	.028901	.037702	.009360
1917	.039661	.070748	.013958
1918	.081120	.109209	.016892
1919	.041490	.182452	.016636

From this we observe that in plant C., the repairs per M. cubic feet of gas made were $.012277 in 1912 and were only $.016336 in 1919. In Plant B. they were $.026675 in 1912 and $.182452 in 1919. Perhaps this item alone is sufficient to condemn House B. In Plant A. they amounted to $0.21719 in 1912 and increased to $.041490 in 1919. First let us note that the actual repairs in House A. were not $.06134, the figure used by Judge HAND to get this amount $.08309. In getting the $.06134 Sangster made some arbitrary apportionments of repair expense not directly chargeable to any particular section of the Astoria plant. In view of the fact that the directly incurred expense on House B. was $.182452 per M. in 1919 and only $.04149 in House A. Sangster's method of distributing the indirect expense does not appear to be reasonable. On the basis of $.04149 per M. and a production of 1,852,877 M. cubic feet, the expense was $78,875.87 for the 8 months of 1919. Little estimated maintenance labor at $26,678.00 and maintenance materials at $31,137.00, a total of $57,815.00. The big part of the difference in the

cost per M. feet comes from the fact that Little assumed more gas could have been made than was actually produced. In this connection it may be noted that for House C. Little allowed $192,470 for maintenance for one year, whereas the expense for eight months was only $97,381.44.

Regarding the actual capacity of the various Houses at Astoria, and on the fair proportion of coal gas to water gas, Judge HAND says in his opinion:

> "Some part of this is probably accounted for by the fact that in Little's figures he considered House A. as running at 100 per cent. per day for 310 days and House C. at 110 per cent. capacity for 365 days. If this was erroneous the fixed charges on each house were divided by too high a figure, and the result was too small per thousand cubic feet. I have already noticed a difference in the case of some of these items, but it will obtain in all those whose gross amount, unlike materials, does not vary with production. Among these labor is one, at least in House A., with inclined retorts, since the same crew will make a varying output at the same wages" (R., p. 161a).

So far as concerns House A., with which the Court is mostly concerned, Little assumed 311 days' operation at 100 per cent. of the company's rated capacity, but he showed that the rated capacity was not in accordance with the fair daily operating capacity.

> "However, the foregoing calculation is based upon the capacity assumed by the company" (R., p. 11195) * * * "The capacity of this inclined Retort House is rated by the company at 10,000,000 cubic feet per day and in average work I am confident it can be maintained quite easily making 16 candle power gas" (R., p. 11196).

When a gas engineer speaks of the rated daily capacity of a plant the figure given represents the fair aver-

age per day over a period of not less than a year. This is clearly shown by the testimony of Little, quoted below:

> "The Master: That is what I understood the witness to say. How much do you get out of Astoria on that basis?
>
> The Witness: Close to 63,000,000 feet a day.
>
> The Master: With a rated capacity of 50,000,000?
>
> The Witness: Yes, sir.

Q. That is, the reported capacities are 30,000,000 and 20,000,000? A. That is right.

Q. And in order to meet your estimate of daily requirements the Astoria plant would have to be run every day during January and February so as to produce 63,000,000? A. No, they could do that, but they would not have to run to that full capacity that I estimate. Some of the other plants also run higher than you claim, could run higher than you claim.

Q. In order to get 93,000,000 you surely would have to run Astoria every day during these months at more than the capacity stated by the company? A. Oh, yes, certainly, stated at times by the company—let me put it that way. The company has at other times claimed other capacities for that plant.

> The Master: Do you mean to say that the complainant company has at any time claimed a capacity for those three units at Astoria of more than 50,000,000 feet?
>
> The Witness: Not exactly that way, but they have claimed on certain plants——
>
> The Master: I am talking of Astoria.
>
> The Witness: On horizontal retorts and the inclines they have claimed that they can make over 12,000,000 feet a day on each" (R., pp. 12173-4).

Appellee's counsel well knew that Little was in a position to answer any questions that might have been

put to him on this claimed capacity of 12,000,000 feet a day on each of the Houses, A and B. That is why this line of cross-examination stopped. It explains why no rebuttal was offered on this point.

Little worked out his capacity per day for House A. on the basis of 8 hour charges of 1,100 pounds of coal. That is to say, 1,100 pounds of coal is put in a retort and left there for 8 hours to carbonize (R., p. 11195). He said that the capacity would not be materially changed if 8 hour charges of 800 pounds were used, but it is obvious that if charges of 800 pounds were put in every four hours—that is six per diem—or every four hours and forty-eight minutes—that is 5 per diem—the "rated" capacity of 10,000,000 feet would be enormously increased.

How does Little's set up of gas to be made at Astoria, House A, compare with the actual amount made? The following table from page 11208 of the record shows the comparison:

COAL GAS PRODUCTION—HOUSE A.

First 8 months of 1919.

	Suggested by Little	Cubic feet Actual
January	310,000,000	308,978,000
February	280,000,000	278,177,000
March	310,000,000	301,922,000
April	300,000,000	272,589,000
May	193,750,000	221,568,000
June	187,500,000	186,136,000
July	193,750,000	132,561,000
August	193,750,000	150,946,000

It must also be remembered that in the A. House the company produced only 4.727 feet of gas per pound of

coal carbonized. If 5.5 feet had been produced the capacity of the House would have been over 2,150,000,000 feet in the 8 months, or even more than Little suggested.

For the period, Little suggested 1,968,750,000 and the amount reported made was 1,852,877,000 cubic feet. The difference could nearly all be explained in still another way by the one fact of the arbitrary slowing up of the House A. in July and August. Even if it were true that Astoria should have as much "idle time as all the company's plants must collectively bear" (R., p. 162a), it certainly does not appear in the testimony that coal gas plants can be so handled. You cannot start up or shut down a coal gas plant in a few hours, as you can a water gas unit. In this connection Little testified:

> "In operating the plants such as are used for making coal gas at Astoria, it is an axiom that they should be worked as near to capacity as possible" (R., p. 1198).

This testimony was not attacked on cross examination, and no rebuttal was offered. If it be claimed by appellee that when part of House C. is shut down there must be a similar slowing up of production in House A. so as to have enough rich water gas to enrich the coal gas, then many reasons can be advanced against this claim.

> (a) If the water gas and coal gas units are not properly balanced at Astoria, the plant should be condemned or remodeled.
>
> (b) If it is necessary to shut down some of the coal gas when a reduction is made in the amount of water gas made at Astoria, the obvious plan would be to shut down some of the expensive B plant and not the less expensive A plant.

(c) If Astoria must have allotted to it some portion of the lost time suffered by all of the company's plants, then it follows that the scattering of plants over Manhattan and Astoria shows very poor judgment on the part of the executives.

In summing up this portion of our brief in connection with fair operating costs, we ask this Court to find that the testimony of Little conclusively shows a mixture of coal gas and water gas can be put into the holders reasonably at a cost not to exceed the amounts shown below:

	Per M. Cubic feet
Cost of coal gas at House A	$.28
Allowance for contingencies	.02
Total cost of coal gas	.30
Cost of water gas	.434
Average cost of two gases	.367
Allowance of 4.1% for gas unaccounted for.	.021
Cost in Holder, based on M. cubic feet sold.	.388

As an alternative, to get the maximum figure for use as a standard, it would surely be no injustice to appellee if the fair operating cost was figured over the 20 month period, 1918, to August 31, 1919, using the figures of Judge HAND as amended by the corrections hereinbefore set forth as follows:

	Per M. Cubic feet
1919 Cost of coal gas	$.33916
Allowance for contingencies	.01084
1919 Total cost	$.35000
1918 Cost of coal gas	$.27610
Allowance for contingencies	.00390
1918 Total cost	.28000
Average cost of coal gas per M. cubic feet, based on above	.315
1919 Cost of water gas	.43422
Allowance for contingencies	.00578
1919 Total cost	.44000
1918 Cost of water gas as found by Sangster and used by Judge Hand	.39843
Allowance for contingencies	.00157
1918 Total cost	.40000
Average cost of water gas per M. cubic feet, based on above	.42000
Average cost of 50 per cent. coal gas and 50 per cent. water gas per M. cubic feet, as shown by above figures	.3675
Allowance of 4.1% for unaccounted for	.0157
Cost in Holder, based on M. cubic feet sold	.3832

XII.

Substantial economy could have been accomplished had appellee adopted the coke oven system of producing coal gas.

The appellant District Attorney respectfully denies the statement by the learned Judge of the Court below, that its engineer, A. S. B. Little, thought House A. was so suitable for making coal gas that it could be taken as a proper standard for ascertaining the just and sufficient cost of producing the amount of coal gas that should reasonably have been made by or for the use of appellee.

Coke ovens and chamber ovens are to all intents identical, the slight structural variance being in that, whereas the old style of coke oven is heated with part of the gas that it makes, the chamber oven—or gas oven as it is sometimes called—can operate either in that way or it can be heated by means of gases generated in separate producers with the use of coke for fuel. According to the latter plan, less coal is needed for making a given amount of gas, and less coke is produced as a residual. Some of the coke so produced can be used for fuel,. thus relieving the stock pile when prices for coke are at a low ebb.

Engineer Little testified that he did not advocate the installation of the old style coke ovens *during the then prevailing period of inflated prices* for construction materials, but he did strongly urge the need for chamber ovens, even under those conditions.

Both the Master and Judge HAND stated they were impressed with Mr. Little's testimony concerning the use of coke ovens for reducing the cost of producing gas.

The Master commented on the offer of the testimony as follows:

"The Master: Well, Mr. Vilas, I am rather impressed with some of the argument of Mr. O'Brien. I really believe that perhaps that is the answer to the situation. I am predisposed against Mr. O'Brien, I think more to the conclusion that he wants me to reach, rather than to proof that he wants to offer. In other words, I am inclined to the view that after Mr. Little has gotten all through presenting his views, and Mr. Addicks has come back and Mr. Woods, and said, 'Well, we have looked at it and here is the trouble with that situation, it will take $10,000,000 to put up a plant, assuming you can get the labor and material, and take several years to put it up, we have got to scrap then a lot of things we are using, and it means a total expense of $15,000,000 or $20,000,000 and our judgment is against it,' and so on and so forth. I would be disposed to conclude against Mr. O'Brien, but perhaps that is what has been in my mind more than the propriety of the evidence, but I can see where it is going to take additional time to go into this issue, and the query is, is this a proper issue? This company is not obliged to make gas as they are making it. Now, if they can scrap all these plants and make gas so cheaply that the present cost of labor and material and the rest of it would not cut any figure, and the scrapping of plants would not cut any figure, and additional investment would not cut any additional figure, and when they get all through they would make a handsome profit on the gas they are selling at 80 cents, I imagine the people are entitled to have it and I am inclined to agree with Mr. O'Brien that the officers of this company cannot stubbornly say they cannot adopt a new method because they do not want to bother with it, and do not want to do it.

Mr. Vilas: As I said, if you allow this testimony in, we will have to meet the issue and we

> will meet it, and it may take two weeks or thirty days more, but it will run into time and we will have to investigate this subject and this testimony. If it goes in and your Honor places no weight on it, we have got to rebut it in any event.
>
> The Master: I have got to place some weight on it, to the extent that Mr. Little says that if this company would put in this additional investment, it could make gas very much cheaper than it is making it now. His testimony up to date is that with present methods, assuming the cost of distribution as they claim it is, you cannot make a fair return on your investment. Now, he starts off with that, but he says if you put in some additional labor-saving devices in the plant as it stands you would make a fair return. I have taken that. That is subject to cross examination. Now he goes one step further and says, 'Why, in addition to what I have said you could put in a coke oven plant and make a handsome profit and people would be getting their gas cheaper.' I think that is highly problematical. I think his statement as to the ability to sell his coke damns the whole scheme because the whole scheme depends upon the ability to sell the coke * * *" (Rec., pp. 11659-60).

Appellee, as the Master said, is not obliged to make gas as it is making it. The gas company cannot stubbornly say it cannot adopt a better method because the executives do not want to bother with it.

Speaking of the coke oven process, the Court below said:

> "Little's whole theory presupposes that a part of the residual coke should be sold at a price of seven dollars a short ton, and that the remainder should be credited at six dollars upon the company's water-gas production cost. He knew nothing whatever about the price at which coke could be sold in New York except what was told him and his information was erroneous. In 1919 the

Seaboard Company was selling it continuously to the plaintiff at six dollars and fifty-five cents a long ton, delivered alongside, and the cost of delivery was certainly fifty cents and perhaps sixty-five cents. * * *

Mr. Doane had been for many years concerned with the coke market in New York and its environs and up to 1915 had made more or less continued efforts to obtain a market for so much as the company did not use. After a time it became cheaper to use than to sell it, but his judgment, based upon his experience, is that it would be impossible to sell such large quantities as would be produced by the coke oven process. As a fuel it has great advantages, but the people are not used to it and it requires different handling from anthracite fuel for which it is a substitute. In Doane's efforts he found this an effective barrier to its introduction. My conclusion is that while the testimony is, as the master says, impressive, it would be unfair to assume that the coke oven system will be more economical, and that it is too uncertain anyway to justify taking its cost of production as a standard here, its results are too indeterminate. As to the so-called 'chamber-oven' system it is too experimental yet to be taken as a substitute cost" (Rec., p. 158-a).

The learned Judge refers to appellee's claim that in 1919 the Seaboard Company was selling coke continuously to plaintiff at $6.50 a long ton, delivered alongside. He fails to note that when appellee attempted to prove by cross examination of Little that the Seaboard Company was not able to sell all the coke it made, and that it sold a quantity of it at a low price to plaintiff (presumably as an advertising feature), Little testified:

"Q. Now, as to the Seaboard, did you learn of the great quantities of coke that they have had accumulated, that they were unable to dispose of * * * in New York City? A. No * * *. They

shipped it, the coke and the breeze, to Bethlehem. They did not dispose of it around here because they got a much bigger price from other people.

Q. How much bigger? A. They got $8.69 *a net ton* at the plant, *including breeze*, in January of this year" (R., pp. 12272-3).

The testimony of Little was not controverted by any qualified gas engineer, appellee evidently believing that it could stand or fall on the rebuttal testimony of its witness, Mr. Doane, in regard to the alleged difficulty in selling coke. Little's testimony is the only reliable evidence of the reasonable cost of producing coal gas in New York City, and it was in no way weakened by Doane's rebuttal testimony. Judge HAND agreed with the Master in stating that Little's testimony was impressive, but in ruling against appellant's contention concerning the use of the coke oven system he relied on the testimony that "Mr. Doane had been for many years concerned with the coke market in New York * * * but his judgment based upon his experience is that it would be impossible to sell such large quantities as would be produced by the coke-oven process." An analysis of Doane's testimony shows (Rec., p. 14104) that he is president and general manager of the National Coal and Coke Company. This is a subsidiary of the appellee. It sells only that part of the coke made in the plants of appellee, or of its subsidiaries, which it does not itself use. The record shows that all of the rebuttal testimony of Doane was directed to the sale or use of *gas house coke* (Rec., p. 14105). There is not one word about by-product coke such as would be made in either of the coke-oven systems.

The major part of Doane's testimony refers to the troubles he had in selling the gas-house coke made at the Astoria plant. That kind of coke, as it is produced and thereafter battered to pieces by appellee, is small,

friable and saturated with moisture (Rec., pp. 14116-14124). It cannot be sold for metallurgical purposes. Little testified, "Yes, coke produced in the coke ovens will sell readily at a higher price than that produced in a retort system" (Rec., p. 12404).

We also ask the Court to consider the following testimony by Doane, concerning coke sales:

> "People were familiar with it, everybody knew what it was. It was used for all kinds of purposes, because there was not the same large quantity of coal coming into New York that there is in later days. I think that that familiarity with the use of coke made it easier to sell coke than it is at the present day, because people have gotten away from the use of coke today, and when you go to sell coke to people today you have got to make them acquainted with a new fuel, although as a matter of fact, it is one of the oldest fuels that has ever been used in New York" (Rec., p. 14130).
>
> * * * * * * *
>
> "A. The reason that I have always understood why coke is not used in larger quantities (in making water gas) is an economical one. It was cheaper, it was to the advantage of the companies to sell coke at the price we have been able to get rather than to use it in their plants.
>
> Q. In the face of the high price of anthracite coal, I repeat it now, why didn't you use more coke than you have used? A. That is my answer.
>
> Q. Then your answer is that you understand it is for reasons of economy? A. Reasons of economy.
>
> Q. You have not given us the quantity of coke you did use in these plants of which you are the head? A. No.
>
> Q. Do you know how much coke you used last year? A. No.
>
> Q. Can you give it approximately? A. No.

Q. Are you acquainted with how much coke is used in the making of gas at Astoria? A. No. R., p. 14133).

* * * * * * *

Q. How much money did you spend last year in the National Coal and Coke Company for the promotion of new business? A. I can't tell you that.

Q. In 1918, if you can approximate it, how much? A. I can't tell you.

Q. Have you any data with you that would refresh your memory? A. No.

Q. Did you spend $5,000? A. Much more than that.

Q. Last year? A. No. Not last year, last year they were not selling coke.

Q. You did not sell any last year? A. Practically none (R., pp. 14133-4).

Doane also testified (p. 14109) that "five years ago" they sold "125,000 tons" in one year; that now they were selling at the rate of only about 50,000 tons per year; but he admitted (p. 14109):

> "We could sell more, if we had a constant uninterrupted supply. The amount we are selling now is as much as the Gas Company can part with at the present time."

Perhaps the most remarkable part of the testimony of Mr. Doane, where he justifies in every way the engineering judgment of Mr. Little, is found at pages 14138-39 and 14159-60 of the record, this being summarized as follows:

> "Q. Are you contemplating in any of your gas companies a return to the coal gas system?
>
> Mr. Ransom: I object to that, there is nothing about a return to a coal gas system. If they get more coal they can make more coal gas.

A. I believe they will.

Q. How soon? A. I won't say soon.

Q. Isn't it inevitable, Mr. Doane, under the present outlook? A. I should think so.

Q. Now, if the price of coal goes up will not the market for coke necessarily increase? A. It will.

* * * * * * *

Q. Is that an ordinary and unavoidable result of a cessation of your selling? A. That is. That is an unavoidable result, because the consumer—you can readily see the consumers who have been accustomed to using our coke, where we have summarily cut them off, have got to resort to other methods, or use other fuel. Perhaps they have changed their grate bars or draft or something else and have had to use other fuel. When we go back to them they will say, 'We cannot depend on your fuel, we will not take it.'

Q. That would mean if you stopped selling coke for a year and a half it would take at least a year and a half to get back that trade? A. It would be hard work to come back to that same state. I should say so. I should say you were right in that conclusion."

We respectfully submit that the testimony of appellee's witness Doane is the best proof in this case of the incompetency of its executives. We are assured by Doane that coke was one of the oldest fuels known to the citizens of New York in past years. It was used in enormous quantities, and the Master himself said that when he was a boy he used to see it being carted extensively throughout the city. Here, then, was an established market for coke. It was recklessly thrown away. So far as we have been able to ascertain the attitude of appellee, the market for this coal gas residual was lost because the gas companies in New York were controlled by the oil interests, who had a waste oil product they wished to sell to the

gas companies. The gradual displacement of coal gas equipment by water gas plants was the inevitable result of the desire on the part of the oil companies to direct the policy of the gas industry.

The Master stated that if Mr. Little's testimony was allowed to go in, Mr. Addicks and Mr. Woods would come back and attack it in rebuttal (Rec., p. 11659). Both Mr. Addicks and Mr. Woods were called by appellee, but they did not offer any testimony to rebut Little's impressive evidence.

Mr. Vilas, one of appellee's counsel, also said:

> "As I said, if you allow this testimony in, we will have to meet the issue and we will meet it, and it may take two weeks or thirty days more, but it will run into time and we will have to investigate this subject and this testimony" (Rec., p. 11659).

It surely is astounding to note that notwithstanding this statement was made, and considering the vital necessity that existed for meeting Little's testimony, the only rebuttal offered by appellee was the rambling evidence of the witness Doane who, if we note carefully his admissions on cross examination, was a very satisfactory witness for appellants.

Little's estimated cost to produce coke-oven gas and enrich it to 22-candle power is stated in the record at pages 11666-78. He testified, at page 11671, that gas could be produced for $0.1990441 per M. cubic feet.

It is the contention of the appellant District Attorney that a modern coal gas plant of this character could and should have been erected many years ago, at a time when the cost of construction was not exorbitant. It would take more than a year to build it, and this accounts for the fact that in the summer of 1919, when appellee began to realize it would have to put in more equipment of a less antediluvian design than was then being operated, it had to rely upon the ability of the manufacturers of water

gas apparatus to construct that character of gas production plant in a hurry. It might be argued by us that when appellee realized it was under fire in this trial for having gambled with its future by the excessive utilization of the expensive water gas process of producing gas, it endeavored to influence the Court by the installation of still another of such plants. It is not a stretch of the imagination to conceive that appellee might resort to this expensive way of attempting to have the Court decide that the past judgment of the executives in leaning on the water gas process was justified by a continuity of its water gas production policy. On the other hand, this Court could take the viewpoint that the interlocking control of the gas and oil business led to the contract to install in 1919 additional water gas units, that would still use further amounts of gas oil, at a time when those familiar with the oil business knew that the production of oil and the stocks of oil derivatives would pass all previous records. Of this interesting point judicial notice may be taken by reference to the periodically published statistics of the United States Geological Survey, Bureau of Mines.

Judge HAND included in his rate base the alleged cost of the new Astoria *water gas unit* in the amount of $4,500,000, but believed that appellee could not reasonably be expected to spend a large sum on a coke oven plant when similar conditions of high prices and scarcity of labor prevailed. It was appellants' contention that the executives of this gas company displayed a lamentable lack of judgment in not installing a coke oven plant when prices for construction material were normal.

As to the alleged inability to get bituminous coal during these years, it appeared (p. 8322) that in 1918 the appellee had so much bituminous coal that it was able to sell 21,099.98 tons—at a profit. In the Operating Journal

for 1918 (p. 429, item 1203, Operating Journal, 1918) appears the following entry:

> "General Suspense—Sale of coal to New York Edison Company—To 'General Profit and Loss,' $71,871.78, 'for the excess of current market price over the actual cost of 21,099.98 tons of bituminous coal sold by this company from its stock at the 14th and 42nd Street stations to the New York Edison Company, such excess having accrued over a period of years during which this company purchased coal at prices considerably lower than those prevailing at the time of the sale."

In view of the fact that the management and operating policy of a public utility is beyond the control of the public, it is pertinent to ask: Can this company select any kind of a plant that it has in mind, operate it according to its own ideas, and then come into court and demand that the public pay the bill? What would be the incentive for good management if a public utility was allowed the same rate of return whether efficiently operated or not?

The basis for determining if the rate is confiscatory should include consideration of the management and operation.

Appellee has not shown that its present system of making gas, that is, the water-gas system, is more economical, in the face of the high price of oil, which obtained in 1918 and 1919, than the coal-gas system, the coke-oven system or any other system under which gas may be made.

From the point of view of the public, the source of the gas is a matter of indifference. Its illuminating and heating power, its other qualities, and the price charged, are the factors that affect the consumers.

There can be no question but that the onus rests upon the appellee to prove beyond a rational doubt

that its system of making gas is economical. There are other systems; which were available during the period when the price of oil was advancing; and under these gas could have been made at less expense. The statute, therefore, should not be declared confiscatory, if, under the particular system used by the complainant and during abnormal times, there was not a fair return upon the value of the property.

It was clearly shown from the testimony of Mr. Woods, Mr. Addicks and Mr. Little that *there are* other systems or methods of making gas.

Coal gas is the backbone of the gas business, and the fluctuations in the supply and price of gas oil are greater than in those of coal.

At the close of the appellee's case, the record shows that no effort has been made by it to prove that it is using the most economical and efficient system, or to show that there are not any more economical ways of making gas than that used by appellee.

The witness Addicks was asked with reference to a report entitled, "Investigation on the conditions covering the choice of a proper quality standard for artificial gas, with conclusions and recommendations of the joint Committee on Calorimetry of the Public Service Commission and gas corporations in the Second Public Service District, New York State." The report discussed the economical production of gas and the fair costs of the different methods of production upon a proper standard for gas as regards candle power and heat units, and expressed an opinion as to the more advantageous and lower cost method of producing gas in view of the existing prices of materials. *This report was dated March 6th, 1913.* It was made by engineers of repute in the gas business, including Mr. Addicks of the appellee, who was chairman.

It was subsequently offered in evidence, but not re-

ceived by the Master (Rec., pp. 4213, 4218, 4227). This report, is, in part, as follows:

> "30. Any enrichment is expensive, and it has been shown above that it is becoming more and more so with the increasing price of oil. It is safe to predict that if the present price of oil continues carburetted water gas will no longer occupy the important position that it has for some years past in the gas industry. Indeed, the idea is now taking firm hold that owing to the oil situation with the practically inexhaustible supply of gas coal now in sight, the gas industry must depend upon coal gas of some sort for the bulk of its output and use water gas as a reserve. In any case, excessive enrichment is useless and unsatisfactory, especially in connection with modern gas appliances."

Results indicate the economic advantages of a larger proportion of coal gas enriched by oil.

As the price of gas oil increased, appellee should for economic reasons have improved its coal-gas system. This appears to be essential from the viewpoint of any prudently operated company, so as to avoid the difficulty which would arise either from a lack of necessary gas oil, or from the price of gas oil rising to a prohibitive point.

Appellee's testimony did not offset the declaration made upon this subject by a committee of the most prominent gas engineers in the country, including Mr. Addicks. Nor did it meet the situation presented when it was shown in the testimony of appellants' witness that the coal-gas system, or coke-oven system, was very much in vogue all over the country, and that 75 per cent. of the companies in the country were selling gas made by the coal-gas method.

It is respectfully submitted that the testimony offered

by appellee does not satisfactorily show that its business is operated under an efficient system. It does not offer any weighty argument to the effect that gas may not be made and sold under the statute assailed, with a fair return upon the value of the plant, if the coal-gas system or the coke-oven system is used.

At no point during the trial was it incumbent upon appellants to take up the burden of proving that under the conditions of recent years the coal-gas system, or the coke-oven system, was more economical than the one in use by appellee.

By using Little's estimate of close to $0.20 per M. cubic feet to produce enriched coal gas, and accepting his testimony that 50 per cent. of this gas could be mixed with 50 per cent. of water gas, the result would be as follows:

Table of Gas Production Costs—1919.

Coal gas from coke ovens, 1919..	$.1990441	per M. cu. ft.
Allowance for contingencies	.0109559	"
Total cost	.210	"
Cost of water gas	.4340	"
Average cost of two gases	.3220	"
Allowance of 4.1% for gas unaccounted for	.0242	
Cost in holder, based on M. cubic feet sold	$.3462	

The advance of science and research, and the absolute necessity for economy whenever and wherever it could have been obtained, should have forced the company to study this important subject of reasonable production cost when it contemplated installing the additional Four Million Dollar Water Gas Unit.

XIII.

Corrections of Judge Hand's findings show that appellee was able to earn adequate return on its property in use by public. Even on Judge Hand's findings, statute should not be held confiscatory.

The learned Judge of the District Court decided that in 1918 appellee had a revenue of $.7991 per M. cubic feet for the gas sold and $.073 for other gas revenue, or $.8721 in all.

He further found that the fair and reasonable operating expense in the year 1918 was $.6908, thus leaving available for profits, or return on the rate base, $.1813 per M. cubic feet of gas sold. For the year 1919 he similarly figured the revenue and arrived at his estimate of costs, and then decided that the profits were equal to an average of $.1169 per M. cubic feet sold in that year. From these net amounts he thought there should be deducted 10 per cent. for Federal income tax (Rec., p. 182-a).

Appellants contend that, on the basis of these findings by the Court below and without making any additions to the net revenues to take care of Judge HAND's errors in judgment, the statute should not be held confiscatory as to appellee. After giving heed to the errors of commission that we have contended herein were made by Judge HAND, an even more substantial and, as it seems to us, unanswerable reason appears for concluding that the rate fixed by the Legislature for gas is just, reasonable and sufficient, and has been compensatory to appellee from the date it was promulgated.

Judge HAND's figure, representing the net revenue

available for profits in the year 1918, was $.1813 per M. cubic feet. For 1919 it was $.1169. The average for the two years would therefore be $.1491 (Rec., p. 182-a).

In Point XI herein we have shown that, on the theory adopted by the Court below with which appellants are not in agreement, the finding of reasonable gas production cost over the two years, 1918 and 1919, should have not exceeded $.3832 per M. cubic feet, as against Judge HAND's average figure of ($.3964 plus $.4519 divided by two=) $.42415.

On the basis of this reasoning, the average net profit of ($.1813 plus $.1169) $.1491 would become $.19005 per M. cubic feet, for the twenty-month period. We have similarly shown that the finding of gas production cost for the year 1919 should not have exceeded $.388 per M. cubic feet as against the figure of $.4519 found by Judge HAND (Rec., p. 182-a). On this reasoning the net profit of $.1169 would become $.1808 per M. cubic feet for the year 1919.

The above figures are obtained by merely making what appear to be obvious corrections to the conclusions of the Court below in respect to production costs.

We have shown in Point VI herein that the findings of Judge HAND in respect to so-called "Distribution Expenses" are not well founded and that there should be deducted from his figures at least $491,013.90 for the year 1918, and at least $422,153.69 for the year 1919, an average per annum of $456,583.79. On a spread of 19 billion feet of gas sold, the deductions would amount to about $.0258 per M. cubic feet in 1918, and $.0222 per M. cubic feet in 1919, an average per annum of $.024.

The figures heretofore given should therefore be further changed to take into account these additional de-

ductions from the reported operating cost. The figures as now amended would be as follows:

	Average, 2 yrs.	1919
Judge HAND's findings of profits....	$.14910	$.1169
Corrections on production cost.....	.04095	.0639
Corrections on distribution cost.....	.02400	.0222
Profits, based on Judge HAND's theory with corrections to his conclusions; per M. cubic feet	$.21405	$.2030

Appellants have contended that because the Astoria property is a separate corporate entity its property is not in question in the instant case. Logically, therefore, we must figure that there should be paid by appellee, to the Astoria Light, Heat and Power Company, a return on that company's property which is used and useful for the benefit of appellee.

Sangster's testimony shows the book investment in the Astoria property amounted, in 1919, to $15,468,667.99 (Rec., p. 11737). Sangster's testimony also shows that the depreciation reserve, plus interest thereon, amounted to $4,084,195.66 in 1919 (Rec., p. 11742).

It is necessary to deduct this reserve from the Astoria book investment in order to ascertain the fair "rate base" for the Astoria property. The net amount is thus found to be $11,384,472.33. Allowing six per cent. as the rate of return, the amount payable by appellee to the Astoria Company would be $683,068.33 per annum.

On a spread of 19 billion cubic feet of gas sold per annum, the figure used by Judge HAND, the average yearly profit to appellee for the two-year period would be $4,066,950 on the basis of the aforesaid $.21405 per M. cubic feet. Out of this, $683,068 would be paid to the Astoria Company, leaving $3,383,882 for profit to the

investors in appellee's property. If we capitalize this at six per cent. the amount would be $56,398,033.

In other words, appellee could have paid, in 1918 and 1919, a fair profit for use of the Astoria property and could have earned, in addition, sufficient to pay six per cent. per annum over the two-years' period on a rate base of over $56,000,000, which is far in excess of the fair value of appellee's property *on any theory that might be used in appraising it.*

In the year 1919, on a spread of 19 billion cubic feet, the net profits would have been $3,857,000 on the basis of our claim herein that the profit per M. cubic feet was $.2030.

Deducting from this the profit to be paid by appellee for the use of the Astoria property, $683,068.33, the amount available to the investors in appellee's property would be $3,173,932. If this were capitalized at six per cent. the amount would be $52,898,866. If this Court should calculate the profits on the basis of the cost of producing the coal gas by means of the economical coke-oven system, instead of on the basis of plants similar to House A, and to this should add the cost of the water gas manufactured in machines equal to those in House C at Astoria, the profits would be even greater than shown hereinabove.

We respectfully ask the attention of this Court to the fact that, although this suit involves millions of dollars, the decision may depend upon whether or not the Court concludes that appellee could have effected the saving of a cent or two, per thousand cubic feet of gas made, by reasonably efficient management. If the arbitrary charge to operating expenses for "Renewals and Replacements" were cut merely one cent per thousand feet of gas sold, the saving would be close to $190,000 per annum. The saving of a cent per gallon in

the purchase price of oil would result in cutting down the cost of manufacturing gas about $650,000. Adding this to Judge HAND's finding of $.1813 profit in the year 1918, the amount available for return to the investors would be $4,094,700 or six per cent. on a capital of $68,245,000.

Adding this amount of $650,000 to Judge HAND's finding of $.1169 per thousand cubic feet for profit in 1919, the amount available for return would be $2,981,100, or six per cent. on close to $50,000,000.

Appellants claim that appellee does not own property of such value, and even if a proper presentation of the case by appellee could demonstrate that the rate base is in the neighborhood of $50,000,000, we still contend that the earning of six per cent. on that investment would be reasonable and sufficient during an abnormal period.

Even if this Court should decide that the investors are entitled to earn, year in and year out, a higher rate of return than is shown by Judge HAND's findings, we respectfully urge that consideration be given to the fact that appellee charged the consumers with huge sums to build up a reserve to take care of contingencies. It collected from its consumers annual amounts for contingencies, *such as lean years*, and has available the enormous reserve of close to $12,000,000. Not one cent of that reserve has been used in meeting this or any other contingency. Why should it not be? The amount *was selected by appellee's executives* and it has no legal or legislative sanction. There is no foundation for it in the experience of appellee unless the reserve is used to meet the contingency brought about by the war.

The consumers have contributed liberally to obtain this vital necessity of daily life. They have paid all costs of operation, taxes, renewals and replacements, and profit

that was unquestioned and undoubtedly more than sufficient from 1906 to 1918. There has also been a reasonable average return in 1918 and 1919 upon the amount of capital expended upon property used and useful in the public service. Can it, therefore, be said that the consumers have not paid full value for the service?

The finding of Judge HAND in the Court below that in 1920 we had entered a five-year period of high prices was proved to be unsound by the conditions that obtained five months after he risked his judgment on this prophecy. Industrial and financial conditions to-day are entirely different from those forecast by the Court.

This Court should take judicial notice of the fact that prices have been reduced on all commodities, are still on the downward trend, and that all indications point to a return to the pre-war level. This is true of the gas industry, and prices of gas production materials must continue to follow the law of supply and demand.

There has been an over-production of oil, and the price of coal is fast approaching the prices of 1914.

The labor employed in the gas industry is mostly unskilled, and it is common knowledge that large numbers of this class of labor are unemployed. The railroad companies, the Steel Corporation and other large employers have reduced the wages of their employees as well as the salaries of officers and managers. The Master was clearly influenced by the belligerent attitude of labor and its inefficiency during the war and following the armistice. With millions of men unemployed, resulting in the President of the United States recommending that remedial measures be taken, the men in the employ of appellee will be forced by competition for positions and jobs to show an increase in efficiency so that the cost per thousand cubic feet will be reduced, even if the labor cost per hour remains unchanged.

We confidently feel that this company will continue to prosper under the statutory rate—a rate that was selected by a wise legislature after due deliberation and careful consideration, and which has stood the test for well over a decade. Our confidence is based on the following factors:

1—Lower commodity prices which indicate decreasing operating expenses.

2—Increased efficiency of labor affecting greater return with smaller working forces.

Although wages have not been cut by appellee the working forces can be reduced to a minimum by weeding out inefficient and careless employees. The result will be the saving of a large amount of the moneys collected from the gas consumers.

So far as fuel is concerned, price reductions in the cost of coal indicate a great improvement in the net income. The decline has been very sharp and coal, which was very scarce and at high prices, is now approaching pre-war level. Indications point to a reduction in the freight rate now that the railroads have reduced the wages of their employees. The high prices recently paid for oil and coal were temporary and could not be maintained. The fall has been rapid and great.

CONCLUSION.

The judgment should be reversed, the bill of complaint dismissed, and judgment rendered in favor of the appellants, with costs.

Respectfully submitted,

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